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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BUILDING & CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY, *et al.*,
Petitioners,

v.

ALTEMOSE CONSTRUCTION COMPANY AND CHAMBER OF COMMERCE OF THE UNITED STATES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BERNARD N. KATZ
Lewis Tower Building
15th & Locust Streets
Philadelphia, PA 19102

RICHARD B. SIGMOND
260 South Broad Street
Philadelphia, PA 19102

LAURENCE J. COHEN
1125 - 15th Street, N.W.
Washington, D.C. 20005

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

LAURENCE GOLD
815 - 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
(Counsel of Record)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. May an antitrust claim against unilateral union action that does not allege any participation by non-labor entities be sustained, notwithstanding the "statutory exemption" to the antitrust laws which protects "unions acting in their self-interest and not in combination with non-labor groups," *H. A. Artists & Associates v. Actors' Equity Assn.*, 451 U.S. 704, 714?

2. After a district court has granted the defendants' motion for summary judgment on an antitrust claim alleging a conspiracy between labor unions and non-labor entities, may a court of appeals reinstate that claim without finding that the "circumstantial evidence" presented on the motion is more consistent with an inference of such a conspiracy than with an inference of independent action?

3. May the charging party in a proceeding before the National Labor Relations Board relitigate in a civil action an issue which has been decided by the Board?

PARTIES IN THE COURT BELOW

Altemose Construction Company; The Chamber of Commerce of the United States of America; Building & Construction Trades Council of Philadelphia and Vicinity; Asbestos Workers Local Union No. 14; Boilermakers Union Local No. 13; Bricklayers Union Local No. 1—Phila.; Bricklayers Union Local No. 12—Chester; Bricklayers Union Local No. 54—Norristown; Bricklayers Union Local No. 64—Residential; Building Service Employees Union Local No. 69; Carpenters Metropolitan District Council; Cement Masons Union Local No. 592; Custom Furniture & Drapery Workers Dry Wall Finishers Local Union No. 1955; Electricians Union Local No. 98; Electricians Local Union No. 126 (Linemen); Electricians Union Local No. 380—Norristown; Electricians Union Local No. 610; Electricians Union Local No. 654—Chester; Elevator Constructors Union Local No. 5; Glass Workers Union Local No. 1166; Glaziers Union Local No. 252; Granite Cutters Int. Union of America; Iron Workers District Council; Iron Workers Union Local No. 401; Laborers District Council; Lathers Union Local No. 53; Lathers Union Local No. 492—Residential; Lead Burners Local Union No. 532; Linoleum Layers and Floor Coverers, Union Local No. 1823; Millwrights and Machinery erectors, Union Local No. 1906; Operating Engineers Union Local No. 542; Painters District Council No. 21; Painters Union Local No. 641—Norristown; Painters Union Local No. 921—Chester; Paperhangers Union Local No. 587; Pipe Trades Council No. 31 of Philadelphia: Plasterers Union Local No. 8; Plasterers Union Local No. 574—Chester; Plasterer Tenders Union Local No. 376; Plumbers Union Local No. 690; Plumbers and Steamfitters, Union Local No. 428—Norristown; Pointers, Cleaners & Caulkers Union Local No. 35; Reinforced Rodsetters Union Local No. 405; Riggers & Machinery Movers Union Local No. 161; Roofers Union Local No. 30 (Composition); Roofers Union Local No. 113

(Slate-Tile); Sheet Metal Workers Union Local No. 19; Sheet Metal Workers Union Local No. 153—(Kitchen Equipment); Sign Makers & Hangers Union Local No. 194; Sign & Pictorial Painters Union Local No. 1159; Sprinkler Fitter Union Local No. 692; Stationary Engineers Union Local No. 835; Steamfitters Union Local No. 420; Stone Masons' Marble & Terrazzo Workers, Local Union No. 3; Terrazzo Workers Helpers Local Union No. 42; Tile and Marble Setters Hlprs., Local Union No. 32; Tile Layers Local Union No. 6; Wharf & Dock Builders Union Local No. 454.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Building & Construction Trades Council of Philadelphia and Vicinity *et al.*, defendants-appellees in the courts below, hereby petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit to review that court's decision and judgment in *Altemose Const. v. Bldg. & Conts. Trades Council*, 751 F.2d 653 (C.A. 3 Nos. 83-1581 & 83-1582, 1985).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 751 F.2d 653 and is reproduced in the separately bound Appendix to this Petition for a Writ of Certiorari ("App.") at pp. 1a-19a. The opinion of the District Court is not officially reported, but is unofficially reported at 117 LRRM 3170; that opinion is reproduced at App. 20a-81a.

JURISDICTION

The decision of the court of appeals was rendered on January 8, 1985, and a timely petition for rehearing was denied on February 15, 1985. App. 82a-83a. On May 7, 1985, Justice Brennan entered an order extending the time for filing this petition to and including July 15, 1985. This Court has jurisdiction under 28 U.S.C. § 1254 (1). The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1337.

STATUTES AND RULE INVOLVED

This case involves §§ 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2; §§ 6 and 20 of the Clayton Antitrust Act, 15 U.S.C. §§ 17 and 29, and §§ 4, 5 and 13 of the Norris-LaGuardia Act, 29 U.S.C. §§ 104, 105 and 113. The case also involves Rule 56 of the Federal Rules of Civil Procedure. These various provisions are reproduced in pertinent part at App. 84a-89a.

STATEMENT OF THE CASE

A. The Factual Background.

The nature of the case, the parties, and the evidence on the basis of which the district court entered summary judgment for the defendants are set forth in that court's comprehensive opinion. The district court "accepted" the plaintiffs' statement of material facts submitted on that motion "as a basis for [its] decision," App. 21a, n.3, and the court of appeals did not disagree with, much less overrule, any of the district court's factual findings. We therefore adopt the district court's statement of the case for purposes of this petition.[1]

The district court began by identifying the parties:

> This is an action for both declaratory and injunctive relief under the Declaratory Judgment Act, and for damages pursuant to § 4 and 16 of the Clayton

[1] Some of the district court's footnotes are omitted, one has been renumbered, and a citation to the Appendix supplied.

> Act. The plaintiffs are Altemose Construction Co. ("Altemose"), a general contractor in the Philadelphia area; Associated Builders and Constructors, Inc. ("ABC"), an association of open shop contractors, and the Chamber of Commerce ("Chamber"), an association whose members purchase construction services. The defendants are the Building and Construction Trades Council of Philadelphia ("Council"), a labor association of local trade unions, and fifty-six labor organizations who are members of the Council. There are also other unnamed union contractors, suppliers and financial institutions implicated in a conspiracy to restrain trade and monopolize the construction market in a five county geographic area. [App. 21a-22a]

That court then described the salient facts about the Philadelphia area construction industry—including its labor relations system—in which the parties operated:

> In the construction industry owners and developers solicit bids from general contractors for particular building projects. The general contractor who receives the contract will ordinarily subcontract most of the specialty work to other subcontractors who perform the work at the job site. There is no established pattern as to the amount of work performed by the general contractor's own employees and that which is subcontracted. Some general contractors employ no construction employees other than supervisory personnel. A subcontractor is usually a separate business enterprise specializing in one phase of construction. Labor relations policy for each subcontractor is decided initially by that business enterprise. Union subcontractors in the greater Philadelphia area have agreed to be bound by the terms of multi-employer collective bargaining agreements with the various trade unions.
>
> The purpose of the Council is "[t]o establish and maintain legal and proper business relations and agreements between [itself] and other responsible parties, either individuals or associations, to the ex-

tent that the best interest of the building industry be served for both employers and employees." By-Laws Art. II, § 3. Its geographic jurisdiction is the five counties of Delaware Valley; Philadelphia, Chester, Bucks, Delaware and Montgomery, and "completely covers the building and construction industry, either in erection, repair, alteration or demolition." Exb. 22 at 1. More importantly for its member unions, the Council is prohibited from entering into any agreement with a contractor or employers' association which requires union members to work with non-union men. Id. at 22.

Most building trade union By-Laws have a prohibition against their members working with non-union employees or non-union firms. These clauses generally require members to report non-union jobs to the union and refuse to handle non-union goods. The General Building Contractors Association ("GBCA") represents active general contractor and subcontractor members who assign to it their rights to bargain collectively with certain defendant unions. Some of the defendant trade unions have established standard collective bargaining agreements with GBCA. The collective bargaining agreements give the union members the right not to work with non-union laborers. The GBCA member contractors hire only union employees under the terms of these agreements and never contract with subcontractors who are not on the Council's fair contractor list. The administration expense of the collective bargaining agreements is financed through an Industry Advancement Fund to which employers make contributions based on hours worked by their union employees. Contributions are required from all employers of covered workers even though such employers are not GBCA members.

The Council seeks to establish and maintain adequate wages and working conditions by members of its constituent unions by means of a Building Trades Agreement which the Council attempts to have gen-

> eral contractors sign.[2] The Council has entered into over four hundred (400) of these agreements with general contractors. They require the general contractor to do business only with subcontractors who enter into collective bargaining agreements with the appropriate craft union members of the Council. The only subcontractors with whom the general contractor may do business under such an agreement are Council approved union (so-called "fair") subcontractors. These fair subcontractors all have collective bargaining agreements with the appropriate trade or craft unions. The "fair" list is circulated by the Council throughout the industry. Since 1966, over 90% of the non-residential construction work has been performed by union contractors. [App. 22a-24a]

Finally, the district court described the genesis of the labor dispute between the plaintiff Altemose and the defendant unions and the course that dispute followed:

> In order to obtain these subcontracting agreements from general contractors, the defendants have picketed jobsites where non-union men are working; there have been threats of violence as well as actual violence at various construction sites in the course of this picketing. The unions have also employed economic pressure on developers, owners and financial institutions to force general contractors to employ union labor exclusively. Some contractors have acceded to union demands and hire only union labor or signed an agreement not to subcontract any work to any subcontractor who has not contracted with the appropriate craft union. Although these tactics have been employed against Altemose since 1971, Altemose has refused to sign such an agreement.

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[2] See Appendix for Text of Forms 1, 2 and 3. [App. 74a-81a] The forms include a clause binding the firm and any other operation in which the signatory firm has a substantial interest, whether or not under separate corporate or company name, e.g., App. I "Scope of Obligation."

In April 1971, Altemose obtained a general contract to build Valley Forge Plaza in Montgomery County, Pennsylvania. The project consisted of an office building, a hotel, movie theaters and various stores and shops. Altemose representatives had several meetings with representatives of the Council concerning the exclusive use of union labor on the project. The Altemose policy was that specialty work for the project would be given to the lowest bidding subcontractor whether or not it employed union labor. It was anticipated that this would result in unionized subcontractors for more than half the project work. The Council and its member unions insisted that unless Altemose signed a subcontractor's trade agreement there would be picketing at the jobsite.

On occasion, between August, 1971 and May, 1972, enter into a subcontractor's trade agreement with several Altemose construction projects were picketed by union members to protest Altemose's refusal to the Council. On June 5, 1972 approximately 1,000 persons, including some principals of the Council, came to the Valley Forge Plaza construction site; what was described by a Pennsylvania trial judge as a "virtual military assault" resulted in the "systematic decimation of the project. Damage was estimated at $300,000 . . . ."

Thereafter, negotiations took place at which time the Council repeated its demand that the Valley Forge project be built solely with union labor. Altemose refused. Picketing occurred at another Altemose job-site in November, 1973 and several projects were continuously picketed from January, 1975 through April, 1975 to protest the Altemose refusal to sign a union subcontractor agreement with the Council. After unfair labor practice charges were filed, the NLRB issued an injunction on April 22, 1975, but picketing resumed on April 28, 1975. Its stated purpose was to require Altemose to observe area wages and standards (rather than to compel it to sign a union subcontractor agreement). After further litigation before the NLRB, the picketing

ceased at those sites and the Board issued its decision.

During the period of labor dispute, material suppliers and subcontractors informed Altemose that they would no longer be involved with its construction projects because of the continuing labor problems. The pressure against non-union subcontractors consisted of threats and intimidation to force them to cease doing business with Altemose and other general contractors. Investors in the projects were urged by the unions to withdraw their financial support. The union membership and general public were urged to withdraw their funds from First Pennsylvania Bank, a major financier of the Valley Forge Project. Because of the labor unrest, Altemose also found it more difficult to obtain performance bonds for its projects and did not receive some jobs even though it had been the low bidder. Some business associations cancelled reservations for use of the Sheraton Hotel in the Valley Forge complex because of their union sympathies.

The union actions against other general contractors who are members of the ABC were similar in kind to those experienced by Altemose. Union sponsored picketing pressured general contractors to utilize union subcontractors; the union pressure directed at these general contractors was to replace non-union with union subcontractors on the Council's "fair" list. Union pressure was also directed toward suppliers of material and capital (i.e., investors and financial institutions) to convince them to withdraw support for the projects. It cannot be denied that the Council's actions in a sense protected union employers as well as its union members. [App. 24a-26a]

B. The Two Counts of the Complaint, and Their Disposition By The Courts Below.

The complaint in the instant case pleads two counts; both are fairly summarized by the court of appeals:

> Count I alleges that the local union defendants and the council conspired with non-labor entities to exclude non-union general and subcontractors from the Philadelphia area construction market.
>
> * * * *
>
> The second count of the complaint alleges that the local unions and the council conspired to force non-union employers out of the Philadelphia construction market. *This count does not allege participation by non-union entities in a conspiracy having secondary effects.* [App. 3a, 10a-11a; emphasis added.]

The district court (Shapiro, J.) granted summary judgment dismissing count I on the ground that the plaintiffs failed to present any evidence of a combination or conspiracy with non-labor entities in opposing the defendants' motion for summary judgment. App. 66a-73a.

That court also granted summary judgment dismissing count II. In so doing, the district court held, *inter alia*, that because count II does not allege a union-employer conspiracy the "conduct alleged in count II is without antitrust significance." App. 42a; *see also id.* 42a-53a.

Plaintiffs Altemose and the Chamber of Commerce (but not the Associated Builders & Contractors) appealed. The court of appeals reversed the grants of summary judgment on both count I and count II and reinstated the action.

With respect to count I, the Third Circuit, following the standard governing the sufficiency of evidence of conspiracy which that court had adopted in *In re Japanese Electronic Products*, 723 F.2d 238, 303-305, *cert. granted, sub nom. Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp.*, No. 83-2004, 53 L.W. 3702 (Apr. 1, 1985), ruled that the evidence in the record here is sufficient to permit an inference of a "concert of action between labor and non-labor entities":

> The record contains circumstantial evidence that the unions maintained a fair contractor list; that the

> Council exerted primary and secondary pressure which had the inevitable effect of benefiting contractors on the list; that firms not on the list were almost totally excluded from the market; that the General Building Contractors Association policed its members to prevent use of non-union contractors, although the contractors' economic interest would suggest, *prima facie*, use of the lowest responsible bidders without regard to unionization; and that an officer of the Council offered to obtain bids from firms on the fair contractors list if Al'emose would sign a Building Trades Agreement. A finder of fact evaluating this evidence could reasonably infer that the Council and the General Building Contractors Association acted in concert to exclude non-union firms from the market. The evidence of such concert of action is not overwhelming, but it is not our task on a motion for summary judgment to weigh it, so long as it is sufficient to support a reasonable inference. [App. 10a]

The court of appeals, while noting that count II alleges only "concerted coercive activities in which the Council and its member locals may have been found to have been engaged," App. 11a, concluded on two grounds that the count nonetheless states an actionable antitrust claim. That court said first:

> Count II alleges, and the summary judgment record would permit a finding, that the open shop contractors have been injured in their business and property by the exclusion of subcontractors from the construction market in the Philadelphia area, and by the inability of general contractors to obtain bids from union subcontractors. The record is clear that the Council has obtained Building Trades Agreements from hundreds of signatories. It is true that in *Connell* the Court made reference to the fact that the plaintiff had signed a contract, implying that this satisfied the *Bradley-Pennington* requirement of participation in the combination of a non-labor party. 421 U.S. at 620, 622, 95 S.Ct. at 1834, 1835. The

> opinion cannot be read as suggesting, however, that contractors who do not sign a contract but are affected by agreements between a union and non-labor parties are unprotected by the antitrust laws. Clearly the Council did not act unilaterally when it obtained hundreds of agreements from contractors the intent and effect of which was to exclude non-union contractors from the market. * * * [App. 12a-13a.]

The court of appeals added that while the district court had held that under *Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616, the unions' actions against Altemose are outside the antitrust laws because the unions "had an organizational purpose at all times," on the evidence in the record "the existence of a purpose to organize employees of Altemose and other ABC contractors is a disputed issue of material fact which could not be resolved in the defendants' favor on a Rule 56 motion." App. 17a. The court of appeals rejected the district court's reliance on a determination by the National Labor Relations Board, in a case brought by Altemose as the charging party, that the unions' activities did have an organizational purpose, stating:

> We have held that a Board decision may be given preclusive effect in a subsequent antitrust case. * * * In that case, however, the party against which collateral estoppel was asserted was a respondent, which controlled its side of the litigation before the Board. Altemose, as the charging party, had no control over the factual or legal issues tried before the Board because the General Counsel controlled the litigation. 29 U.S.C. § 160 (1982). Moreover, ABC and the Chamber of Commerce were not involved in the Board proceeding even as charging parties. Thus it is clear that no plaintiff had a full and fair opportunity to litigate the issue of organizational purpose before the Board, and all are free to attempt to do so in this proceeding. [App. 18a.]

REASONS FOR GRANTING THE WRIT

Introduction

On the important and historically controversial subject of the role of the antitrust laws in regulating labor union activities, one principle has been firmly established for over forty years since *United States v. Hutcheson*, 312 U.S. 219 (1941): labor unions may not be held liable under the antitrust laws when the unions act in their own self-interest and not in combination with a non-labor group. (See pp. 12-18, *infra.*) The decision of the court of appeals undermines that principle by two rulings each of which enables a plaintiff to prevail on an antitrust claim *without* establishing the existence of such a combination.

That court reinstated an antitrust claim (count II) from which plaintiffs deliberately omitted any allegation of a union-nonlabor group conspiracy. And, in reinstating count I of the complaint here the court of appeals ruled that an antitrust plaintiff raises a triable issue of fact on a motion for summary judgment if there is "circumstantial evidence" from which a union-nonlabor group conspiracy "could be inferred," but without even considering whether that evidence is equally susceptible of an inference of independent, non-conspiratorial conduct.

The first of these rulings simply reverses forty years of decisions in this Court. (See pp. 12-18, *infra.*) And while the latter ruling is not as obviously inconsistent with the Court's labor/antitrust precedents, its inevitable consequence is likewise to undermine the requirement that the plaintiff establish a union-nonlabor conspiracy. The standard for determining whether evidence is sufficient to permit a conspiracy claim to go forward is a familiar and important issue under the antitrust laws that is before this Court also in a case in which review has already been granted. (See pp. 18-24, *infra.*)

Additionally, the court below sharply circumscribed the collateral estoppel effect of decisions of the National

Labor Relations Board. This ruling, which has widespread significance, is in square conflict with decisions of two courts of appeals and is contrary to the governing principle set forth by this Court. (See pp. 24-27, *infra.*)

I.

This Court's jurisprudence on the labor exemptions to the anti-trust laws rests on a fundamental distinction between anti-trust complaints where "labor unions [are] acting in their self-interest and not in combination with non-labor groups" and complaints where "a union [has combined] with a 'non-labor group'." *H.A. Artists & Associates v. Actors' Equity Assn.*, 451 U.S. 704, 714, 715. The decision below eradicates that distinction wherever the union defendants have entered into collective agreements with one group of employers and are seeking on their own and without "participation by non-union entities in a conspiracy having secondary effects," App. 10a, to secure the same type of agreement from other employers. In essence the court of appeals has revived the judicial doctrine repudiated by Congress first in the Clayton Act and then, after *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, again in the Norris-La Guardia Act and ultimately, in light of those congressional responses, by this Court in *United States v. Hutcheson*, 312 U.S. 219.

H.A. Artists is this Court's most recent reaffirmation of the governing law. That decision begins by noting the "inherent tension" that has made it so difficult to harmonize anti-trust policy and national labor policy and by recapitulating the initial wrong steps by the judiciary that led to congressional correction and the Court's consequent reformulation of the law to accord with Congress' will in *Hutcheson*:

> Labor unions are lawful combinations that serve the collective interests of workers, but they also possess the power to control the character of com-

petition in an industry. Accordingly, there is an inherent tension between national anti-trust policy, which seeks to maximize competition, and national labor policy, which encourages cooperation among workers to improve the conditions of employment. In the years immediately following passage of the Sherman Act, courts enjoined strikes as unlawful restraints of trade when a union's conduct or objectives were deemed "socially or economically harmful." *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 485 (Brandeis, J., dissenting). In response to these practices, Congress acted, first in the Clayton Act, 38 Stat. 731, and later in the Norris-LaGuardia Act, 47 Stat. 70, to immunize labor unions and labor disputes from challenge under the Sherman Act.

* * *

In *United States* v. *Hutcheson*, 312 U.S. 219, the Court held that labor unions acting in their self-interest and not in combination with nonlabor groups enjoy a statutory exemption from Sherman Act liability. After describing the congressional responses to judicial interference in union activity, *id.*, at 229-230, the Court declared that

> [s]o long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 [of the Clayton Act] are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means." *Id.*, at 232 (footnote omitted). * * *

[451 U.S. at 713-715; footnotes omitted.]

The *H.A. Artists* Court then summarized the limitation on the foregoing exemption recognized in *Hutcheson* itself and elaborated in *Allen Bradley Co.* v. *Union*, 325 U.S. 797:

> The statutory exemption does not apply when a union combines with a "non-labor group." *Hutche-*

> *son*, *supra*, at 232. Accordingly, antitrust immunity is forfeited when a union combines with one or more employers in an effort to restrain trade. In *Allen Bradley Co.* v. *Electrical Workers*, 325 U.S. 797, for example, the Court held that a union had violated the Sherman Act when it combined with manufacturers and contractors to erect a sheltered local business market in order "to bar all other business men from [the market], and to charge the public prices above a competitive level." *Id.*, at 809. The Court indicated that the union efforts would, standing alone, be exempt from antitrust liability, *ibid.*, but because the union had not acted unilaterally, the exemption was denied. Congress "intended to outlaw business monopolies. A business monopoly is no less such because a union participates, and such participation is a violation of the Act." *Id.*, at 811. [451 U.S. at 715-716; footnotes omitted.]

Finally, *H.A. Artists* adds "Even where there are union agreements with nonlabor groups that may have the effect of sheltering the nonlabor groups from competition in product markets, the Court has recognized a "nonstatutory" exemption to shield such agreements if they are intimately related to the union's vital concerns of wages, hours, and working conditions.", *id.* at 716, n.19, and quotes extensively from *Connell Co.* v. *Plumbers & Steamfitters*, 421 U.S. 616, 622.

In sum, the starting point of, and the single immutable principle in, all of this Court's decisions from *Hutcheson* to *H.A. Artists* is "that labor unions acting in their self-interest and not in combination with nonlabor groups enjoy a statutory exemption from Sherman Act liability," 451 U.S. at 714. Nonetheless, in the instant case the court of appeals denied this statutory exemption to actions taken by the defendant unions on their own and without "participation by non-union entities." App. 10a. According to the court below, where, as here, a plaintiff non-union employer alleges that unilateral union actions directed against the plaintiff take place against a back-

ground of union-employer agreements "the intent and effect of which was to exclude non-union contractors from the market" the statutory exemption no longer protects the actions of the union acting alone. App. 12a-13a.

As a practical matter, the approach of the court of appeals leaves nothing of the statutory exemption. All viable unions are party to collective agreements. If, as here, the allegation that these agreements have an adverse anticompetitive effect on the plaintiff is sufficient to deny the defendant union the protection of the exemption insofar as the union acts alone, the exemption has no meaning. At that point, such union action, as well as union-nonlabor group agreements, would, under that court's view, be judged in the first instance by the far less protective standard of the "limited nonstatutory exemption" designed for judging "union-employer agreements," *Connell*, 421 U.S. at 622.

This reading of the antitrust laws stands this Court's cases on their head. The point of *Allen-Bradley* and its progeny is that the antitrust laws are aimed at combinations of businessmen and at the protection of product and service markets from such combinations, that the antitrust laws are not aimed at labor unions as such and that the antitrust laws therefore reach only unions that "aid and abet businessmen who are violating the Act." 325 U.S. at 807. In *Allen-Bradley*, the Court expressly recognized:

> Our holding means that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups. That, it is argued, brings about a wholly undesirable result—one which leaves labor unions free to engage in conduct which restrains trade. But the desirability of such an exemption of labor unions is a question for the determination of Congress * * *. Congress evidently concluded * * * that the chief objec-

> tive of Anti-trust legislation, preservation of business competition, could be accomplished by applying the legislation primarily only to those business groups which are directly interested in destroying competition. * * * A business monopoly is [however] no less such because a union participates, and such participation is a violation of the Act. [325 U.S. at 810-811.]

And in *Mine Workers v. Pennington*, 381 U.S. 657, the next major step in the evolution of the Court's treatment of union-nonlabor group agreements, combinations and conspiracies, the Court emphasized:

> We have said that a union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers. No case under the antitrust laws could be made out on evidence limited to such behavior. But we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry. [381 U.S. at 665-666; footnote omitted.]

Plainly this reasoning leaves no room for the court of appeals' supposition that the fact that the defendant union is a party to collective agreements is a basis for denying the union the statutory exemption for its unilateral actions. Nor does *Connell*, the one decision in this Court relied on by the court below, support its position. That case, as the court of appeals recognized, in both form and substance dealt with the legality of a union-employer agreement not with unilateral union action.

(*See* App. 12a: "It is true that in *Connell* the Court made reference to the fact that the plaintiff had signed a contract, implying that this satisfied the *Bradley-Pennington* requirement of participation in the combination of a non-labor party. 421 U.S. at 620, 622.") And the *Connell* Court made it plain at the very outset that this fact was its basis for treating the controversy as one raising a non-statutory exemption issue:

> The basic sources of organized labor's exemption from federal antitrust laws are §§ 6 and 20 of the Clayton Act, 38 Stat. 731 and 738, 15 U.S.C. § 17 and 29 U.S.C. § 52, and the Norris-La Guardia Act, 47 Stat. 70, 71, and 73, 29 U.S.C. §§ 104, 105, and 113. These statutes declare that labor unions are not combinations or conspiracies in restraint of trade, and exempt specific union activities, including secondary picketing and boycotts, from the operation of the antitrust laws. See *United States* v. *Hutcheson*, 312 U.S. 219 (1941). They do not exempt concerted action or agreements between unions and nonlabor parties. *Mine Workers* v. *Pennington*, 381 U.S. 657, 662 (1965). The Court has recognized, however, that a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions. *Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965). [421 U.S. at 621-622.]

The proposition that *Connell* can be read as an instruction to the lower courts to judge unilateral union action (such as that here at issue in count II) as well as union-employer agreements (such as the one in that case or the combination alleged in count I here) according to the limited non-statutory exemption rather than the statutory exemption is flatly contrary to the *Connell* opinion. For the Court there reaffirmed that while the Clayton and Norris-La Guardia Acts do "not exempt concerted action or agreements between unions and nonlabor parties,"

Congress, in those enactments, did "exempt specific union activities, including secondary picketing and boycotts, from the operation of the antitrust laws."

The court of appeals evidently finds fault with Congress' judgment on this matter. Sound public policy, as that court would make policy, is that "contractors who do not sign a contract [with a union] but are affected by agreements between a union and non-labor parties," like contractors who do sign an agreement, should be "[]protected by the antitrust laws." App. 13a. But Congress' policy, as this Court has recognized, is otherwise. Unilateral union action not undertaken as part of a combination or conspiracy with businessmen no matter what its purpose and effect is by reason of the Clayton and Norris-LaGuardia Act entirely outside the antitrust laws and is regulated by the labor laws and by compatible state law. Only certain union-nonlabor group agreements are subject to the antitrust laws. That is the line Congress drew and the line the courts are obligated to respect.

II.

A recurring and central issue in civil antitrust litigation is the nature and quantum of proof of conspiracy—absent direct evidence thereof—that the plaintiff must present in order to withstand a motion for summary judgment by the defendant. The Court squarely confronted this issue in *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, holding that the plaintiff's showing in opposition to a defendant's motion for summary judgment was insufficient because

> the inference that Cities' failure to deal was the product of factors other than conspiracy [was] at least equal to the inference that it was due to the conspiracy, thus negating the probative force of the evidence showing such a failure * * *. [391 U.S. at 280.]

Here, however, the court of appeals reversed the district court's grant of summary judgment to the defendant un-

ions on the count which alleges a conspiracy between the unions and non-labor entities merely because such a conspiracy "could be inferred" from the actions of the alleged conspirators, App. 10a, without even considering whether there is an equal inference that each of those actions rests on an independent and non-conspiratorial base.

This Court has already granted certiorari to decide whether the Third Circuit is applying too loose a standard in determining whether a plaintiff has presented sufficient evidence to permit an inference of conspiracy so as to withstand a motion for summary judgment in an antitrust suit. *Matsushita Electric Industrial Co., Ltd., v. Zenith Radio Corp.*, No. 83-2004, *cert. granted* April 1, 1985, 53 L.W. 3702, to review *In re Japanese Electronic Products*, 723 F.2d 238 (C.A. 3).[3] That is the decision the court below followed in the present case in enunciating the standard for considering the sufficiency of the conspiracy evidence.[4] In both instances, Judge Gibbons, writing for the court of appeals, set aside a summary judgment that the district court had granted to the de-

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[3] The first question presented by the petition for certiorari in *Matsushita* is:

> Whether, in an antitrust conspiracy case based upon "parallel" acts and other circumstantial evidence, summary judgment for the defendants may be reversed when the District Court has found that all of the evidence is entirely consistent with the independent economic self-interest of each defendant, and the Court of Appeals has neither rejected that finding nor even considered whether defendants' actions were more consistent with an inference of conspiracy than with an inference of independent action? [Pet. for Cert. No. 83-2004, p. i]

[4] This Court recently outlined the legal standard governing sufficiency of evidence of conspiracy. We noted that the court must examine all admissible evidence, direct and circumstantial, in order to determine whether a trier of fact could reasonably infer concert of action. *In re Japanese Electronic Products*, 723 F.2d 238, 303-05 (3d Cir. 1983). [App. 5a]

fendants after a comprehensive evaluation of the evidence submitted by the plaintiffs.[5]

It would, we submit, be appropriate to consider the instant case together with *Matsushita* because this case casts further light on the serious infirmities of the Third Circuit's approach. As we shall briefly show, each of the pieces of "circumstantial evidence" on the basis of which that court held that there is sufficient evidence to permit the inference of a conspiracy between the defendant unions and non-labor entities is at least equally—and in our view far more plausibly—susceptible to the opposite inference.

The first two points made by the court of appeals are closely related and properly discussed together. That court relied on evidence "that the unions maintained a fair contractor list [and] that the Council exerted primary and secondary pressure which had the inevitable effect of benefitting contractors on the list." App. 10a. But earlier in the opinion the court of appeals itself had acknowledged the weakness of the evidence as support for an inference of conspiracy:

> One result of the Council's pressure tactics was to favor contractors on its list of fair contractors. Another result, however, was to obtain the work for members of its local unions. Absent some additional evidence, the inference that the Council acted in concert with the contractors in pursuit of the first objective would be highly speculative. [App. 9a] [6]

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[5] Here Judge Shapiro cited the opinion Judge Becker had written in the district court in *Matsushita*: "While the Supreme Court has cautioned that summary judgment should be used sparingly in antitrust cases, summary adjudication may be granted even in these complex cases. See *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 513 F. Supp. 1100, 1140, n.53 (E.D. Pa. 1981), appeal docketed * * * (3rd Cir. Aug. 24, 1981)." App. 30a, footnote omitted.

[6] Even the foregoing characterization puts the evidence of the unions' actions in a light too favorable to the plaintiffs. Keeping a

Nor does the other "circumstantial evidence" relied on below render more probable an inference of conspiratorial rather than wholly innocent conduct. The court of appeals observed that the General Building Contractors Association policed its members to prevent use of non-union contractors, although "the contractors' economic interest would suggest, *prima facie*, use of the lowest responsible bidders without regard to unionization." App. 10a. This simply disregards the members obligation under the collective bargaining agreements to "hire only union employees and to refrain from subcontracting with subcontractors who are not on the Council's fair contractor list." App. 4a. Adherence to a legal obligation is an entirely reasonable and proper non-conspiratorial course of conduct, and the Association's insistence thereon is wholly consistent with its role as the contractors' joint bargaining representative. *Id.* And even if, contrary to general experience, parties can be expected to violate their contracts whenever it is in their economic self-interest to do so, the very existence of this legal obligation obviously alters their economic calculation.[7]

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list of "fair contractors" is useful if not indispensable to further the unions' interest in knowing at all times whether there is an operative agreement with a particular contractor (so that the unions can police compliance with the agreement and fulfill their own obligations thereunder) or, alternatively, whether, because the contractor is not on the list, an effort should be made to obtain an agreement from him. This need is especially acute in the building and construction industry where each local union is likely to have contracts with a large number of contractors, and where the situs of those contractors' operations is constantly shifting. Moreover, unions exercise their economic weapons in order to achieve their own immediate objectives, such as more favorable working conditions, or to organize the unorganized. Only in the most extraordinary circumstances is the benefit to the struck employer's competitors a purpose, let alone the principal purpose, of the unions' action.

[7] Thus, to obtain a short-run benefit at lower wages, a contractor breaching that subcontracting clause would risk financial liability in a suit under § 301 of the Labor-Management Relations Act of 1947 ("LMRA"). Further, like any employer or other businessman who

Lastly, the evidence "that an officer of the Council offered to obtain bids from firms on the fair contractors list if Altemose would sign a Building Trades Agreement," App. 10a, is entirely consistent with the unions' interest in getting Altemose to do so, by assuring Altemose that the company could operate economically under the subcontracting clause.[8]

A further ground for review of the court of appeals' reinstatement of count I is that unless the courts scrupulously insist that evidence proffered to support an antitrust conspiracy be at least equally probative of such a conspiracy as of independent decision-making, the antitrust laws will place in jeopardy parties who engage in activities which those laws permit. This is the danger which was identified in *Monsanto Co. v. Spray-Rite Service Corp.*, —— U.S. ——, 104 S.Ct. 1464 (March 20, 1984), in prescribing "the standard of proof required to submit a case to the jury in distributor-termination ligigation." *Id.* at 1468. In *Monsanto* the Court was concerned with the evidentiary standard for deciding whether a manufacturer's termination of a distributor who had been cutting prices was the manufacturer's independent action or the consequence of a price-fixing agreement between the manufacturer and the price cutting distributor's competitors. The Court held:

> On a claim of concerted price-fixing, the antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was [a price fixing] agreement. If an inference of such an agreement may be drawn from highly ambiguous evidence,

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breaches an agreement, he would undermine his long-term relationship with the other contracting party, here the union.

[8] Indeed, if the Council had refused to find union subcontractors for Altemose (although it was under no duty to do so), Altemose might have argued with equal plausibility that this supported an inference that the Council was trying to drive Altemose out of the market.

> there is a considerable danger that the doctrines enunciated in *Sylvania* and *Colgate* will be seriously eroded. [104 S.Ct. at 1470.] [9]

See also id. at 1471.[10]

The references to *Sylvania* and *Colgate* were, of course, to this Court's decisions which held, respectively, that concerted action between manufacturers and distributors creating *non-price* restrictions is not *per se* illegal but is subject to the rule of reason [11] and that a manufacturer may lawfully refuse to deal with a distributor who fails to adhere to the retail price established by the manufacturer.[12]

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[9] While *Monsanto* arose on review of the sufficiency of the evidence to support a jury verdict for the plaintiff, there is no material distinction between the standard of proof in that procedural context and on a motion for summary judgment. Accordingly, the courts of appeals of two circuits have applied the *Monsanto* standard in reviewing, and affirming, grants of summary judgment to defendants because the respective plaintiffs had failed to make a sufficient showing to support their claims of conspiracy. *Royal Drug Co. v. Group Life & Health Insurance Co.*, 737 F.2d 1433, 1438 (C.A. 5), *cert. den.* 53 L.W. 3507 (January 14, 1985); *Landmark Development Corp. v. Chambers Corp.*, 752 F.2d 369, 372 (C.A. 9).

[10] There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently. As Judge Aldisert has written, the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Edward J. Sweeney & Sons, supra*, at 111; accord *H.L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935, 941 (CA 2 1981) cert. denied, 459 U.S. 880 (1982); cf. *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946) (Circumstances must reveal "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement").

[11] *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36.

[12] *U.S. v. Colgate & Co.*, 250 U.S. 300.

As in *Monsanto*, the "flaw in the evidentiary standard" adopted by the court of appeals in this case is that it "disregards this danger," by allowing the plaintiff to proceed on what is as we have shown, at most "highly ambigious evidence" of conspiracy. Unions and employers who bargain together in accordance with Congressional labor policy are especially vulnerable to allegations that their relationship is a "conspiracy." In describing the collective bargaining process, this Court has observed that the "parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest." *Labor Board v. Insurance Agents*, 361 U.S. 477, 488; *see also*, *Pennington*, *supra*, quoted at p. 16.

The co-existence of "economic interdependence" and contrary "viewpoints and concepts of self-interest" is central to the problem. If the existence of economic interdependence between unions and employers, and rational behavior by both in furtherance of their mutual interest is sufficient to permit an inference of an antitrust conspiracy, then the very relationship which it is the policy of the labor laws to further will create a serious risk of liability under the antitrust laws. It is the insight of *Monsanto* that conspiracy inferences must not be permitted on "highly ambiguous evidence" lest doctrines which limit the sweep of the antitrust laws—there *Sylvania* and *Colgate*; here the "statutory" and "nonstatutory" exemptions—be "seriously eroded."

III.

This certiorari petition should be granted also to resolve a conflict in the circuits concerning the preclusive effect to be given in civil litigation to the decisions of the National Labor Relations Board.

The district court held that Altemose is collaterally estopped with respect to the finding of the NLRB in

Building & Construction Trades Council (Altemose Construction), 222 NLRB 1276 (1976), *aff'd mem. sub nom. Altemose Construction v. NLRB*, No. 76-1336, 93 LRRM 3085 (3d Cir., Dec. 8, 1976), that the Council had picketed Altemose for organizational and recognitional objectives in violation of § 8(b)(7)(C). App. 58a. The court of appeals reversed the district court, ruling that since "Altemose, as the charging party, had no control over the factual or legal issues tried before the Board because the General Counsel controlled the litigation, 29 U.S.C. § 160 (1982)", Altemose did not have "a full and fair opportunity to litigate the issue of organizational purpose before the Board, and [is] free to attempt to do so in this proceeding." App. 18a, footnote omitted. This ruling was necessary (though not sufficient, see point I, *supra*) for the court of appeals' reversal of the summary judgment on count II.[13]

The court of appeals' holding that a charging party may not be collaterally estopped by findings of the NLRB is directly in conflict with decisions of the Fifth and Sixth Circuits. In *International Wire v. Local 38, Int. Bro. of Elec. Wkrs.*, 475 F.2d 1078 (C.A. 6), *cert. den.*, 414 U.S. 867, the court affirmed the dismissal of an action under § 303 of the LMRA for damages caused by an alleged secondary boycott in violation of § 8(b)(4). The

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[13] The court of appeals determined that the Chamber of Commerce was not estopped from litigating the question of the union's objective for the additional reason that the Chamber had not been a party to the proceedings before the Board. App. 18a. Review of the collateral estoppel ruling with respect to Altemose is called for nevertheless because, in addition to the general importance of resolving the conflict among the circuits on that question, a resolution with respect to Altemose would be "fundamental to the further conduct of th[is] case." *U.S. v. General Motors*, 323 U.S. 373, 377. Only Altemose is seeking damages; reinstatement of the summary judgment against that party would therefore greatly simplify the proceedings on remand. Moreover, the Chamber's request for injunctive relief may be subject to dismissal under the Norris-LaGuardia Act. See *Connell*, 421 U.S. at 637, n.19; *Drivers' Union v. Lake Valley Co.*, 311 U.S. 91.

Sixth Circuit held that the employer was collaterally estopped by the NLRB's prior determination, in a case arising from charges filed by the employer, that the union had not violated § 8(b)(4). 475 F.2d at 1079. In *Machinists v. Nix*, 512 F.2d 125 (C.A. 5), the Fifth Circuit held that an employee was precluded from relitigating in state court the issue of whether he had stolen confidential documents because this issue had been litigated before and decided against the employee by the Board in a case initiated by his unfair labor practice charge against his employer, the Machinists Union. Since resolution of the issue was necessary to the Board's decision, the employee was precluded by collateral estoppel from relitigating it in state court. *Id.* at 132.

In granting the Board's decision preclusive effect the district court followed this Court's seminal decision in *United States v. Utah Construction Co.*, 384 U.S. 394, 422. App. 58a, n.78. In *Utah Construction* the Court held:

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose. [384 U.S. at 422]

In accordance with that decision several courts of appeals, including the court below, have precluded a party which was a respondent before the NLRB from relitigating an issue there decided.[14] Unlike the Fifth and Sixth Circuits in the cases discussed above, however, the Third Circuit has ruled here that a charging party is not sub-

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[14] *See, e.g., Consolidated Express, Inc. v. New York Shipping Ass'n*, 602 F.2d 494, 503 (C.A. 3), *vacated and remanded*, 448 U.S. 902; *Paramount Transp. Sys. v. Chauffeurs, Teamsters & Helpers Local 150*, 529 F.2d 1284 (C.A. 9), *cert. den.*, 426 U.S. 908; *Painters District Council 38 v. Edgewood Contracting Co.*, 416 F.2d 1091 (C.A. 5).

ject to that preclusion rule because of what that court perceived to be limitations on the charging party's role before the NLRB. In this the court below erred.

Under the NLRB's Rules and Regulations, the charging party in an unfair labor practice case is a "party" to the proceedings on the complaint generated by his charge and has the right to participate in the hearings before the administrative law judge "to call, examine and cross-examine witnesses, and to introduce into the record documentary or other evidence, ..." 29 CFR §§ 102.8 & 102.38.[15] As a "party," the charging party also has the right to file exceptions with the Board to the administrative law judge's decision, and to file a brief with the Board in support of its exceptions or of the administrative law judge's decision. 29 CFR § 102.46. Altemose exercised these rights by intervening in the proceedings before the administrative law judge, 222 NLRB at 1281, and filing both exceptions to the ALJ's decision and briefs to the NLRB, *id.*, at 1276. Thus, contrary to the court of appeals, Altemose had a "full and fair opportunity to litigate the issue of organizational purpose before the Board," and, indeed, Altemose prevailed on that issue.

The court of appeals' decision, therefore, is inconsistent with the principle established in *Utah Construction*, and the decisions of the Fifth and Sixth Circuits which adhere thereto.

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[15] The administrative law judge is authorized to limit the participation of any party, and to the extent that such limitation is actually imposed and prejudices the ability of the party to fully and fairly litigate a particular issue, that party would not be precluded from relitigating that issue later. That is not the case here.

CONCLUSION

For the above stated reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

BERNARD N. KATZ
Lewis Tower Building
15th & Locust Streets
Philadelphia, PA 19102

RICHARD B. SIGMOND
260 South Broad Street
Philadelphia, PA 19102

LAURENCE J. COHEN
1125 - 15th Street, N.W.
Washington, D.C. 20005

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

LAURENCE GOLD
815 - 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
(Counsel of Record)

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BUILDING & CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY, *et al.*,
Petitioners,

v.

ALTEMOSE CONSTRUCTION COMPANY AND CHAMBER OF COMMERCE OF THE UNITED STATES,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BERNARD N. KATZ
Lewis Tower Building
15th & Locust Streets
Philadelphia, PA 19102

RICHARD B. SIGMOND
260 South Broad Street
Philadelphia, PA 19102

LAURENCE J. COHEN
1125 - 15th Street, N.W.
Washington, D.C. 20005

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

LAURENCE GOLD
815 - 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
(Counsel of Record)

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APPENDIX A

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

Nos. 83-1581, 83-1582

ALTEMOSE CONSTRUCTION COMPANY, ASSOCIATED BUILDERS AND CONTRACTORS, INC., THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

v.

BUILDING & CONSTRUCTION TRADES COUNCIL OF PHILDELPHIA AND VICINITY, *et al.*

Appeal of Altemose Construction Company

Appeal of the Chamber of Commerce of the United States of America

---

Argued Sept. 11, 1984

Decided Jan. 8, 1985

Rehearing and Rehearing In Banc

Denied Feb. 15, 1985

John W. Pelino (argued), David A. Gradwohl, Howard A. Rosenthal, Pelino & Lentz, P.C., Philadelphia, Pa., for Altemose Construction Co.

Gerard C. Smetana (argued), Gary L. Starkman, Arvey, Hodes, Costello & Burman, Chicago, Ill., for The United States Chamber of Commerce.

Richard B. Sigmond (argued), Bernard N. Katz, Margaret A. Browning, Meranze, Katz, Spear & Wilderman, Philadelphia, Pa., for Building and Construction Trades Council of Philadelphia and Vicinity, et al.

Laurence J. Cohen, Robert D. Kurnick, Sherman, Dunn, Cohen, Leifer & Counts, P.C., Washington, D.C., for Building and Construction Trades Department, AFL-CIO, amicus curiae.

Before GIBBONS and GARTH, Circuit Judges, and TEITELBAUM, District Judge.*

OPINION OF THE COURT

GIBBONS, Circuit Judge:

Altemose Construction Company (Altemose), a general contractor, Associated Builders and Construction Contractors, Inc. (ABC), an association of open shop contractors, and the Chamber of Commerce of the United States of America, an association whose members purchase construction and are construction users, brought this action for declaratory relief pursuant to 28 U.S.C. § 2201-02 (1982), treble damages pursuant to 15 U.S.C. § 15 (1982), and injunctive relief pursuant to 15 U.S.C. § 26 (1982). Altemose and The Chamber of Commerce appeal from a summary judgment in favor of defendants. The defendants are the Building and Construction Trades Council of Philadelphia (the Council), an association of local building trade unions in the Philadelphia area, and fifty-six local unions who are members of the Council. The complaint charges that the defendants conspired among themselves and with other named co-conspirators

* Hon. Hubert I. Teitelbaum, Chief Judge of the United States District Court for the Western District of Pennsylvania, sitting by designation.

to eliminate competition in the commercial construction industry in the Philadelphia area by excluding open shop contractors from that industry and by forcing all contractors to employ only union subcontractors, in violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1982). The district court held that there were no material issues of disputed fact and that the defendants were entitled to a judgment in their favor as a matter of law.[1] We reverse and remand for further proceedings.

I.

Count I

The complaint pleads two counts. Count I alleges that the local union defendants and the Council conspired with non-labor entities to exclude non-union general and subcontractors from the Philadelphia area construction market. The trial court dismissed Count I because the plaintiffs failed to present any evidence of a combination or conspiracy with non-union entities in opposition to defendants' motion for summary judgment. Our review of this ruling is plenary.

A.

The Count I Defendants and Alleged Co-Conspirators

The Council is an association of building trades local unions in the Philadelphia area which are in good standing with international unions affiliated with the Building and Construction Trades Department, AFL-CIO. Among other tasks, the Council resolves jurisdictional disputes among these local unions. Local unions which are members of the Council may not inaugurate strikes or place pickets against a general contractor "fair to union labor" without the Council's consent. A general contractor "fair

[1] Counterclaims are pending in the district court. The court ordered that the summary judgment on plaintiffs' claims be entered as a final judgment pursuant to Fed.R.Civ.P. 54(b). Thus we have appellate jurisdiction.

to union labor" is defined in the Council's by-laws as one that employs union labor and subcontracts work only to subcontractors employing union labor. The by-laws also provide that "any contractor who works on a struck job or employs non-union men to work on a struck job, shall be declared unfair and all Union men shall be called off from his work or shop," and that "[n]o local . . . shall enter into any agreement with a Contractors' or Employers' Association to work with non-union men." The by-laws provide further:

> To the extent it is legally permitted and in conformity with both the law and existing contract obligations, any trade affiliated with the Building Trades may picket any job that has a non-union condition, if the General Contractor has a Building Trades Agreement or is a member of G.B.C.A. and maintain the picket line with full support and sanction of the Building Trades until the situation is corrected.

The reference in the quoted by-law provision to G.B.C.A. is to the General Building Contractors Association, an association of general contractor and subcontractor members who engage in collective bargaining with building trades unions through that organization. The reference to a Building Trades Agreement is to standard agreements which the Council has obtained from over 400 contractors and subcontractors in the Philadelphia area. The Council publishes a Union Directory of Fair Contractors and Subcontractors. The fair contractors and subcontractors all have collective bargaining agreements with local unions which are members of the Council. The collective bargaining agreements give union members the right not to work with non-union laborers and oblige the contractors and subcontractors to hire only union employees and to refrain from subcontracting with subcontractors who are not on the Council's fair contractor list. Since 1966, over 90% of the construction work in the Philadelphia area has been performed by firms listed in

the Council's Union Directory of Fair Contractors and Subcontractors.

It is undisputed that the Council is a labor organization, and that in obtaining Building Trades Agreements it is, at least in part, pursuing the labor objective of maintaining area standards for wages and working conditions. The plaintiffs' theory in Count I of the complaint, however, is that the Council and its members have acted in concert with contractors and subcontractors on its fair contractor list to exclude from the construction market in the Philadelphia area all firms which are not on that list.

B.

Standards for Proof of Conspiracy

This court recently outlined the legal standard governing sufficiency of evidence of conspiracy. We noted that the court must examine all admissible evidence, direct and circumstantial, in order to determine whether a trier of fact could reasonably infer concert of action. *In re Japanese Electronic Products*, 723 F.2d 238, 303-05 (3d Cir.1983). For purposes of this appeal that standard will be applied in determining whether or not summary judgment was proper on Count I. Section 6 of the Norris-LaGuardia Act, 29 U.S.C. § 106, (1982), does not require the application of any different standard. That section requires "clear proof" that an actor is an agent of a union, but the clear proof requirement is inapplicable to proof of conspiracy or other wrongful acts in antitrust actions against labor unions. *Ramsey v. United Mine Workers*, 401 U.S. 302, 91 S.Ct. 658, 28 L.Ed.2d 64 (1971). Moreover, even with respect to proof of agency, the "clear proof" standard should be applied by the fact-finder in drawing inferences and making findings. On a Rule 56 motion we may not draw inferences or make findings. Thus even on issues of union authorization, participation in, or ratification of acts complained of, our

role is to determine only whether such inferences are, under the evidence, logically permissible. Our plenary review of the grant of summary judgment is no different when the defendants are labor unions than in any other summary judgment context. If logical inferences of union authorization, participation in, or ratification of the acts complained of are permissible, it will be for the trier of the facts to apply the "clear proof" standard of section 6.

C.

The Summary Judgment Record

There is evidence in the summary judgment record from which a factfinder could conclude that the Council and its member locals resorted to rather vigorous efforts to obtain Building Trades Agreements. The defendants have picketed jobsites where non-union tradespersons were working. They have resorted to threats of violence and actual violence at various jobsites. They have employed economic pressure not only upon contractors, but upon developers, owners, and financial institutions, to force contractors to employ union labor and union subcontractors exclusively.

Altemose, a general contractor, has refused to sign a Building Trades Agreement. It employs a permanent labor force which is not covered by collective bargaining agreements with Council members, and it follows a policy of awarding subcontracts to the lowest bidder, whether or not the subcontractor employs union labor. In April, 1971, Altemose obtained a general contract to build Valley Forge Plaza in Montgomery County, Pennsylvania, a project consisting of an office building, a hotel, theaters, stores and shops. The Council insisted that unless Altemose signed a Building Trades Agreement there would be picketing on the jobsite. On June 5, 1972, approximately 1000 persons, including some principals of the Council, committed what was described by a Pennsylvania trial

judge as a "virtual military assault" on the Valley Forge jobsite, inflicting physical damage estimated at $300,000. *See Altemose Construction Co. v. Building and Construction Trades Council*, 449 Pa. 194, 198, 296 A.2d 504, 507 (1972), *cert. denied*, 411 U.S. 932, 93 S.Ct. 1901, 36 L.Ed.2d 392 (1973). Thereafter the Council repeated its demand that Altemose execute a Building Trades Agreement. Picketing occurred at other Altemose jobsites as well.

After Altemose filed an unfair labor practice charge, the National Labor Relations Board was successful in obtaining an injunction, pursuant to section 10(1) of the National Labor Relations Act, 29 U.S.C. § 160(1) (1982) restraining the Council from engaging in secondary boycotts pending Board resolution of the charge.[2] While the dispute between Altemose and the Council members continued, the Council threatened non-union subcontractors and intimidated them into ceasing to do business with Altemose. It also pressured material suppliers, who advised Altemose they would no longer furnish material for its construction projects. Union members and the public were urged to withdraw deposits from First Pennsylvania Bank, a major financier of the Valley Forge Project. Businesses were urged to cancel, and did cancel, reservations at the Sheraton Hotel, a tenant in the Valley Forge complex. Altemose found it difficult to obtain performance bonds for its projects because of the labor unrest caused by the Council, and in some instances found its bid rejected although it was the low bidder.

Although the record evidence with respect to other ABC contractors is less dramatic than with respect to Altemose, there is evidence that the Council engaged in similar activities directed at them. Union-sponsored picketing forced general contractors to replace non-union sub-

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[2] *Hirsch v. Building and Constr. Trades Council*, 530 F.2d 298 (3d Cir. 1976). The Board's resolution of the charge is discussed at Part II A 2, *infra*.

contractors with subcontractors listed in the Union Directory of Fair Contractors and Subcontractors. Union pressure was directed toward their material suppliers, and toward financial institutions which might furnish funding for their projects.

Thus the summary judgment record clearly would support a finding that the Council and its members exerted both primary and secondary pressure in order to prevent non-union firms from obtaining construction work in the Philadelphia area. The defendants contend, however, that such pressure, whether or not legal as a matter of labor law, is exempt from antitrust scrutiny because of the statutory and nonstatutory labor antitrust exemptions. The plaintiffs, relying on *Allen Bradley Co. v. Local 3, International Brotherhood of Electrical Workers*, 325 U.S. 797, 65 S.Ct. 1533, 89 L.Ed. 1939 (1945), and *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 95 S.Ct. 1830, 44 L.Ed.2d 418 (1975), contend that the defendants forfeited both exemptions by acting in concert with the contractors listed in the Union Directory of Fair Contractors and Subcontractors. Defendants counter that there is no evidence, direct or circumstantial, in the summary judgment record which would permit an inference of concert of action between the labor defendants and the favored contractors.

There is evidence of a predominantly unionized construction market in the Philadelphia area. The Council has obtained over 850 Building Trades Agreements with general contractors; its member locals have collective bargaining agreements with more than 4,000 subcontractors, and as a result approximately 90% of the construction market is served by contractors listed in the Union Directory of Fair Contractors and Subcontractors.[3] Standing alone, that evidence probably would not permit

[3] Most of the ten percent balance could be found to be small residential construction, which has not been organized.

an inference of concern of action among the defendants and the favored contractors aimed at excluding non-union firms from the market. One result of the Council's pressure tactics was to favor contractors on its list of fair contractors. Another result, however, was to obtain the work for members of its local unions. Absent some additional evidence, the inference that the Council acted in concert with the contractors in pursuit of the first objective would be highly speculative.

The summary judgment record contains, however, some such additional evidence. There is evidence that the General Building Contractors Association, a contractor organization, polices its members to be sure that they deal only with subcontractors on the Council's fair contractors list. That conduct appears to be conscious parallel conduct which *prima facie* is inconsistent with contractor economic interest in awarding work to the lowest bidder. There is evidence that in at least one instance an officer of the Council complained to the General Building Contractors Association that one of its members had hired a non-union subcontractor, that the matter was discussed with the member, and the offense was rectified. (Deposition of Joseph M. Washkill). Moreover, Altemose produced evidence from which it could be found that the Council promised that if Altemose signed a Building Trades Agreement the Council would send it unionized companies that would finish its jobs at prices lower than that bid by ABC subcontractors.

The General Building Construction Association is comprised of non-labor members. Unlike the theatrical agents in *H.A. Artists & Associates, Inc. v. Actors Equity Ass'n.*, 451 U.S. 704, 101 S.Ct. 2102, 68 L.Ed.2d 558 (1981), the Association's efforts are aligned on the side of purchasers rather than sellers of labor. If it acted in concert with the Council, this case would be governed by *Allen Bradley Co., supra*, for purposes of the statutory exemptions in sections 6 and 20 of the Clayton Act, 15

U.S.C. § 17, 29 U.S.C. § 52 (1982), and sections 4, 5 and 13 of the Norris-LaGuardia Act, 29 U.S.C. §§ 104, 105 and 113 (1982). Further, *Connell Construction Co. v. Plumbers & Steamfitters Local 100, supra*, would in such circumstances rule out the application of the nonstatutory exemption of the Sherman Act to an agreement between the General Building Contractors Association and the Council restraining competition of the non-union contractors who are members of ABC.

We hold that the trial court erred in granting summary judgment on Count I for lack of evidence from which concert of action between labor and non-labor entities could be inferred. The record contains circumstantial evidence that the unions maintained a fair contractor list; that the Council exerted primary and secondary pressure which had the inevitable effect of benefiting contractors on the list; that firms not on the list were almost totally excluded from the market; that the General Building Contractors Association policed its members to prevent use of non-union contractors, although the contractors' economic interest would suggest, *prima facie*, use of the lowest responsible bidders without regard to unionization; and that an officer of the Council offered to obtain bids from firms on the fair contractors list if Altemose would sign a Building Trades Agreement. A finder of fact evaluating this evidence could reasonably infer that the Council and the General Building Contractors Association acted in concert to exclude non-union firms from the market. The evidence of such concert of action is not overwhelming, but it is not our task on a motion for summary judgment to weigh it, so long as it is sufficient to support a reasonable inference.

II.

Count II

The second count of the complaint alleges that the local unions and the Council conspired to force non-union em-

ployers out of the Philadelphia construction market. This count does not allege participation by non-union entities in a conspiracy having secondary effects. The trial court dismissed Count II holding that even if such a conspiracy were proved, both the statutory and the non-statutory exemptions preclude an antitrust cause of action. As with the summary judgment on Count I, our review is plenary.

A.

The Exemptions

The concerted coercive activities in which the Council and its member locals may be found to have engaged would clearly result in antitrust liability if engaged in by non-labor parties. The defendants contend that because they are labor organizations, while they may be accountable under federal labor law or state tort law, they are exempt from antitrust liability. Courts and commentators commonly refer to two separate sources of exemption: statutory and non-statutory.

(1) The Statutory Exemption

The statutory sources of antitrust exemption for labor organizations are sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17 (1982), and 29 U.S.C. § 52 (1982), and sections 4, 5 and 13 of the Norris-LaGuardia Act, 29 U.S.C. §§ 104, 105 and 113 (1982). These statutes declare that labor unions are not in themselves combinations or conspiracies in restraint of trade, and exempt many of their activities from the operation of the antitrust laws. Interpreting these interrelated statutes, the Supreme Court in *United States v. Hutcheson*, 312 U.S. 219, 232, 61 S.Ct. 463, 466, 85 L.Ed. 788 (1941), held that unilateral union activity having a labor objective is exempt "[s]o long as a union acts in its self-interest and does not combine with non-labor groups," even though the underlying dispute is a jurisdictional one with another

union, and does not concern mandatory subjects of collective bargaining. In *United Mine Workers v. Pennington*, 381 U.S. 657, 662, 85 S.Ct. 1585, 1589, 14 L.Ed.2d 626 (1965), and *Allen Bradley Co. v. Local 3, International Brotherhood of Electrical Workers*, 325 U.S. 797, 65 S.Ct. 1533, 89 L.Ed. 1939 (1945), however, the Court interpreted the exemption statutes as inapplicable to concerted action or agreements between unions and nonlabor parties having effects outside the parties' collective bargaining relationship. That interpretation of the statutory exemption was reiterated in *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 622, 95 S.Ct. 1830, 1835, 44 L.Ed.2d 418 (1975). *See Larry v. Muko, Inc. v. Southwestern Pennsylvania Building and Construction Trades Council*, 609 F.2d 1368, 1373 (3d Cir. 1979); *Consolidated Express Inc. v. N.Y. Shipping Ass'n*, 602 F.2d 494, 517 (3d Cir. 1979), *vacated and remanded on other grounds*, 448 U.S. 902, 100 S.Ct. 3040, 65 L.Ed.2d 1131 (1980).

The Building Trades Agreements which the Council sought to impose on Altemose and other ABC members were essentially the same as the agreement considered by the Supreme Court in *Connell*, in that when executed they obliged the signatories to refrain from subcontracting to non-union subcontractors. In *Connell*, the Supreme Court held that the challenged agreement was subject to antitrust sanctions. The trial court held, nevertheless, that the statutory exemption applied in this case, because in *Connell* the plaintiff had executed the agreement, whereas the plaintiffs here refused to do so. The court's reasoning misinterprets both the complaint and the Supreme Court's caselaw.

Count II alleges, and the summary judgment record would permit a finding, that the open shop contractors have been injured in their business and property by the exclusion of subcontractors from the construction market in the Philadelphia area, and by the inability of general

contractors to obtain bids from union subcontractors. The record is clear that the Council has obtained Building Trades Agreements from hundreds of signatories. It is true that in *Connell* the Court made reference to the fact that the plaintiff had signed a contract, implying that this satisfied the *Bradley-Pennington* requirement of participation in the combination of a non-labor party. 421 U.S. at 620, 622, 95 S.Ct. at 1834, 1835. The opinion cannot be read as suggesting, however, that contractors who do not sign a contract but are affected by agreements between a union and non-labor parties are unprotected by the antitrust laws. Clearly the Council did not act unilaterally when it obtained hundreds of agreements from contractors the intent and effect of which was to exclude non-union contractors from the market. Thus we cannot affirm the summary judgment on Count II on the theory that the Clayton Act and the Norris-LaGuardia Act exempt the conduct complained of.

(2) The Nonstatutory Exemption

The nonstatutory exemption involves the interrelationship between judge-made interpretations of the Sherman Act and several subsequent congressional labor law enactments. The seminal nonstatutory exemption case is *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 60 S.Ct. 982, 84 L.Ed. 1311 (1940), in which the Court held that the Sherman Act did not apply to a conspiracy by labor union members to obstruct or prevent delivery in interstate commerce of goods manufactured by a party with which they had a labor dispute. Conceding that neither the Clayton Act nor the Norris-LaGuardia Act afforded exemption, the Court held that Congress nevertheless did not intend the Sherman Act to reach the conduct in question. We have noted that

> *Apex Hosiery* establishes two principles central to the subsequent development of the nonstatutory exemption. First, the rationale of the exemption is

> protection of the union's power to eliminate competition in the labor market over wages and working conditions. Restraints operating on that primary market are presumptively outside the scope of the Sherman Act. Second, restraints, like those in *Duplex Printing* [*Press*] *Co.* [*v. Deering*, 254 U.S. 443, 41 S.Ct. 172, 65 L.Ed. 349 (1921)] . . . , which are aimed at controlling a secondary product or service market are suspect, and are presumptively covered by the Sherman Act.

Consolidated Express, Inc., 602 F.2d at 514.

Critical to the application of the nonstatutory exemption, therefore, is the identification and lawfulness of the labor parties' objectives. The lawfulness of those objectives, moreover, depends upon several statutes enacted subsequent to the *Apex Hosiery* interpretation of the Sherman Act.

The first such enactment was the Labor Management Relations Act of 1947. Pub.L. No. 101, ch. 120, 61 Stat. 136, *codified as amended* at 29 U.S.C. §§ 141-97 (1982). Section 8(b)(4) of that statute for the first time made it an unfair labor practice for a union to coerce "the employees of any employer" with the object of "forcing or requiring any employer . . . to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer . . . ." This prohibition against activity aimed at secondary targets did not, however, reach restraints embodied in collective bargaining arrangements. Thus under the Labor Management Relations Act unions, as a matter of labor law, remained free to seek such restraints by collective bargaining and picketing.

The Labor-Management Reporting and Disclosure Act of 1959 imposed further restraints upon union activity directed at secondary targets. That act amended section 8(b)(4) to extend the prohibitions against coercion di-

rected toward secondary targets to coercion of employers as well as to coercion of employees. Pub.L. No. 86, ch. 257, § 704(a), 73 Stat. 542, *codified at*, 29 U.S.C. § 158-(b)(4)(i) (1982). In addition a new section 8(e) was added to the National Labor Relations Act, making it an unfair labor practice for any labor organization to enter into a contract or agreement whereby an employer "agrees to . . . cease doing business with any other person . . . ." *Id.* § 704(b). The section 8(e) prohibition against contract provisions thus was added to the section 8(b)(4) prohibition against coercion. The section 8(e) prohibition against contract clauses in which employers agreed to refrain from doing business with other persons was qualified, however, by the proviso that

> nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction. . . .

Id. In addition, despite the general prohibitions of sections 8(b)(4) and 8(e), applicable to labor organizations, and the prohibitions in section 8(a) against employer assistance in organizing, the Labor-Management Reporting and Disclosure Act of 1959 provided that:

> [i]t shall not be an unfair labor practice under subsections (a) and (b) . . . for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members . . . because (1) the majority status of such labor organization has not been established . . . , or (2) such agreement requires as a condition of employment, membership in such labor organization. . . .

Pub.L. No. 86-257 § 705(a), 73 Stat. 545, *codified at* 29 U.S.C. § 158(f) (1982). This section thus authorizes pre-hire agreements on representation in the construction industry.

After the enactment of the Labor Management Relations Act of 1947 and the Labor-Management Reporting Act of 1959, it was for some time unclear whether the Supreme Court would consider those statutes as pre-emptive of the Sherman Act insofar as it might apply to secondary activities by labor organizations. In *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 633-34, 95 S.Ct. 1830, 1840-41, 44 L.Ed.2d 418 (1975), the Court held that section 8(e) was not preemptive of the Sherman Act, leaving open the preemption question with respect to section 8(b). *Id. Connell* is a construction industry case, and the Court held that the authorization in section 8(f) of pre-hire agreements in the construction industry did not apply "outside the context of a collective-bargaining relationship." [4] *Id.* at 635, 95 S.Ct. at 1841. Thus it is clear that contractual provisions prohibiting contracts with nonunion firms, entered into outside the collective bargaining context, and coercive concerted activities aimed at obtaining such agreements, remain subject to antitrust scrutiny under the Sherman Act.

The district court held that despite *Connell* the Building Trades Agreements challenged here, and the coercive activities exerted in an effort to obtain such agreements, were exempt from Sherman Act scrutiny on two grounds.

First, the court reasoned, there is in the record no agreement prohibiting the use of non-union contractors,

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[4] Recently in *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 102 S.Ct. 2071, 72 L.Ed.2d 398 (1982), the Court in an unfair labor practice case construed the proviso to be applicable to subcontractor clauses in collective bargaining agreements whether or not restricted to jobsites at which both union and nonunion workers are employed.

whereas in *Connell* the plaintiff executed, but later disavowed such an agreement. We have already rejected that reasoning with respect to the statutory exemptions. Part II A(1), *supra*. It is no more persuasive with respect to the nonstatutory exemption. Altemose and other ABC contractors, not in a collective bargaining relationship with the defendants, were subject to coercion aimed at obtaining the prohibited contracts. Moreover, there is ample evidence that other signatories refrained from doing business with those plaintiffs as a result of such agreements.

Alternatively the court held that in this case, unlike *Connell*, the unions could not be found to have violated the federal labor law. The court reasoned that if the union activity was legal as a matter of labor law it must be exempt under the antitrust laws.[5] The court found that the coercion against Altemose was justified because even though the union had no collective bargaining relationship with Altemose, the coercion had an organizational purpose at all times. On this record, however, the existence of a purpose to organize employees of Altemose and other ABC contractors is a disputed issue of material fact which could not be resolved in the defendants' favor on a Rule 56 motion. There is evidence in the record from which a factfinder could infer that the Council had no such purpose. Moreover the Council itself does not enter into collective bargaining agreements. At best it sought from Altemose and the ABC contractors an agreement to enter into pre-hire agreements if they should later enter into collective bargaining agreements.

Recognizing that disputed fact issues as to the Council's purpose would ordinarily preclude summary judg-

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[5] *But see United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965); *Larry V. Muko, Inc. v. Southwestern Pennsylvania Building and Construction Trades Council (Muko I)*, 609 F.2d 1368, 1375, n. 1.

ment, the trial court held that the plaintiffs were collaterally estopped from contending for the absence of an organizational purpose by virtue of the decision of the National Labor Relations Board in Altemose's unfair labor practice case. In that proceeding the Board found that the respondent unions had violated section 8(b)(7) of the Act, 29 U.S.C. § 158(b)(7) (1982), by engaging in organizational picketing for more than thirty days. We are not persuaded that collateral estoppel justified a summary judgment. We have held that a Board decision may be given preclusive effect in a subsequent antitrust case. *Consolidated Express*, 602 F.2d at 503. In that case, however, the party against which collateral estoppel was asserted was a respondent, which controlled its side of the litigation before the Board. Altemose, as the charging party, had no control over the factual or legal issues tried before the Board because the General Counsel controlled the litigation. 29 U.S.C. § 160 (1982). Moreover, ABC and the Chamber of Commerce were not involved in the Board proceeding even as charging parties. Thus it is clear that no plaintiff had a full and fair opportunity to litigate the issue of organizational purpose before the Board, and all are free to attempt to do so in this proceeding.[6]

Thus there are material issues of disputed fact over whether the Council and those acting in concert with it had an organizational purpose. *A fortiori* there are material fact issues as to the existence of a collective bargaining relationship. Absent such a relationship the pre-hire exception for the construction industry is inapplicable. If it is inapplicable, *Connell* precludes application of a nonstatutory exemption to the antitrust laws.

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[6] This case is fundamentally different, therefore, from *Donald Schriver, Inc. v. NLRB*, 635 F.2d 859 (D.C.Cir.1980), on which the trial court relied, which was before the court on the Board's petition for enforcement.

III.

Conclusion

Since there are material issues of disputed fact which preclude application of the statutory and non-statutory exemptions either to Count I or to Count II, the court erred in entering summary judgment for the defendants. The judgment appealed from will, therefore, be reversed and the case remanded for trial.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 73-773

ALTEMOSE CONSTRUCTION COMPANY, ASSOCIATED BUILDERS AND CONTRACTORS, INC., THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

v.

BUILDING AND CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY, ET AL.

[Filed July 6, 1983]

MEMORANDUM OF DECISION

NORMA L. SHAPIRO, J. July 5, 1983

I. PROCEDURAL AND FACTUAL BACKGROUND

Before the court in this labor-antitrust litigation are cross-motions for summary judgment. The issue is whether the union activities to obtain certain agreements in the construction industry are protected from antitrust attack by labor exemptions to the antitrust laws. Plaintiffs' motion was for partial summary judgment; it seeks only an adjudication on the question of liability.[1] De-

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[1] The individual plaintiff also seeks treble damages.

fendants filed an answer and cross-motions for summary judgment, and a second motion to dismiss. After supplemental memoranda were filed, the court held oral arguments on a voluminous record.[2] Defendants' cross-motions are now granted.[3]

This is an action for both declaratory and injunctive relief under the Declaratory Judgment Act,[4] and for damages pursuant to § 4 and 16 of the Clayton Act.[5] The plaintiffs are Altemose Construction Co. ("Altemose"), a general contractor in the Philadelphia area; Associated Builders and Constructors, Inc. ("ABC"), an association of open shop contractors, and the Chamber of Commerce ("Chamber"), an association whose members purchase construction services. The defendants are the Building and Construction Trades Council of Philadelphia ("Council"), a labor association of local trade unions, and fifty-six labor organizations who are members of the Council.[6] There are also other unnamed union contractors, suppliers and financial institutions implicated in a conspiracy

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[2] This case had been previously assigned to two other district judges before transfer to this judge. A prior opinion by then District Judge Higginbotham dismissed the counterclaims based on the antitrust laws. See *Altemose Const. v. Bldg. & Const. Trades Council*, 443 F.Supp. 492 (E.D. Pa. 1977).

[3] Plaintiffs' statement of material facts is accepted as a basis for decision. Any disputed facts are resolved in favor of the plaintiffs, except as noted. See infra at n. 79. Moreover, all inferences drawn are viewed in the light most favorable to the plaintiffs. See infra at p. 15.

[4] 28 U.S.C. §§ 2201-02 (1982). Only the association plaintiffs desire injunctive relief. Altemose seeks treble damages.

[5] 15 U.S.C. §§ 15, 26 (1973). Section 4 of the Clayton Act provides the jurisdiction of this court, and the treble damage remedy for violations of §§ 1 & 2 of the Sherman Act (15 U.S.C. §§ 1 & 2). Section 16 of the Clayton Act provides an equitable remedy.

[6] Several of the defendant unions are no longer members of the Council.

to restrain trade and monopolize the construction market in a five county geographic area.

In the construction industry owners and developers solicit bids from general contractors for particular building projects. The general contractor who receives the contract will ordinarily subcontract most of the specialty work to other subcontractors who perform the work at the job site. There is no established pattern as to the amount of work performed by the general contractor's own employees and that which is subcontracted. Some general contractors employ no construction employees other than supervisory personnel. A subcontractor is usually a separate business enterprise specializing in one phase of construction. Labor relations policy for each subcontractor is decided initially by that business enterprise. Union subcontractors in the greater Philadelphia area have agreed to be bound by the terms of multi-employer collective bargaining agreements with the various trade unions.

The purpose of the Council is "[t]o establish and maintain legal and proper business relations and agreements between [itself] and other responsible parties, either individuals or associations, to the extent that the best interest of the building industry be served for both employers and employees." By-Laws Art. II, § 3. Its geographic jurisdiction is the five counties of Delaware Valley; Philadelphia, Chester, Bucks, Delaware and Montgomery, and "completely covers the building and construction industry, either in erection, repair, alteration or demolition." Exb. 22 at 1. More importantly for its member unions, the Council is prohibited from entering into any agreement with a contractor or employers' association which requires union members to work with non-union men. Id. at 22.

Most building trade union By-Laws have a prohibition against their members working with non-union employees or non-union firms. These clauses generally require members to report non-union jobs to the union and

refuse to handle non-union goods. The General Building Contractors Association ("GBCA") represents active general contractor and subcontractor members who assign to it their rights to bargain collectively with certain defendant unions. Some of the defendant trade unions have established standard collective bargaining agreements with GBCA. The collective bargaining agreements give the union members the right not to work with non-union laborers. The GBCA member contractors hire only union employees under the terms of these agreements and never contract with subcontractors who are not on the Council's fair contractor list. The administration expense of the collective bargaining agreements is financed through an Industry Advancement Fund to which employers make contributions based on hours worked by their union employees. Contributions are required from all employers of covered workers even though such employers are not GBCA members.

The Council seeks to establish and maintain adequate wages and working conditions by members of its constituent unions by means of a Building Trades Agreement which the Council attempts to have general contractors sign.[7] The Council has entered into over four hundred (400) of these agreements with general contractors. They require the general contractor to do business only with subcontractors who enter into collective bargaining agreements with the appropriate craft union members of the Council. The only subcontractors with whom the general contractor may do business under such an agreement are Council approved union (so-called "fair") subcontractors. These fair subcontractors all have collective bargaining agreements with the appropriate trade or craft unions. The "fair" list is circulated by the Council

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[7] See Appendix for Text of Forms 1, 2 and 3. The forms include a clause binding the firm and any other operation in which the signatory firm has a substantial interest, whether or not under separate corporate or company name, e.g., App. I "Scope of Obligation."

throughout the industry. Since 1966, over 90% of the non-residential construction work has been performed by union contractors.

In order to obtain these subcontracting agreements from general contractors, the defendants have picketed jobsites where non-union men are working; there have been threats of violence as well as actual violence at various construction sites in the course of this picketing. The unions have also employed economic pressure on developers, owners and financial institutions to force general contractors to employ union labor exclusively. Some contractors have acceded to union demands and hire only union labor or signed an agreement not to subcontract any work to any subcontractor who has not contracted with the appropriate craft union. Although these tactics have been employed against Altemose since 1971, Altemose has refused to sign such an agreement.

In April 1971, Altemose obtained a general contract to build Valley Forge Plaza in Montgomery County, Pennsylvania. The project consisted of an office building, a hotel, movie theaters and various stores and shops. Altemose representatives had several meetings with representatives of the Council concerning the exclusive use of union labor on the project. The Altemose policy was that specialty work for the project would be given to the lowest bidding subcontractor whether or not it employed union labor. It was anticipated that this would result in unionized subcontractors for more than half the project work. The Council and its member unions insisted that unless Altemose signed a subcontractor's trade agreement there would be picketing at the jobsite.

On occasion, between August, 1971 and May, 1972, several Altemose construction projects were picketed by union members to protest Altemose's refusal to enter into a subcontractor's trade agreement with the Council. On June 5, 1972 approximately 1,000 persons, including some principals of the Council, came to the Valley Forge Plaza

construction site; what was described by a Pennsylvania trial judge as a "virtual military assault" resulted in the "systematic decimation of the project. Damage was estimated at $300,000 . . . ." [8]

Thereafter, negotiations took place at which time the Council repeated its demand that the Valley Forge project be built solely with union labor. Altemose refused. Picketing occurred at another Altemose job-site in November, 1973 and several projects were continuously picketed from January, 1975 through April, 1975 to protest the Altemose refusal to sign a union subcontractor agreement with the Council. After unfair labor practice charges were filed, the NLRB issued an injunction on April 22, 1975,[9] but picketing resumed on April 28, 1975. Its stated purpose was to require Altemose to observe area wages and standards (rather than to compel it to sign a union subcontractor agreement). After further litigation before the NLRB, the picketing ceased at those sites and the Board issued its decision.[10]

During the period of labor dispute, material suppliers and subcontractors informed Altemose that they would no longer be involved with its construction projects because of the continuing labor problems. The pressure against non-union subcontractors consisted of threats and intimidation to force them to cease doing business with Altemose and other general contractors. Investors in the projects were urged by the unions to withdraw their financial support. The union membership and general public were urged to withdraw their funds from First Pennsylvania Bank, a major financier of the Valley Forge Project. Because of the labor unrest, Altemose also

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[8] See *Altemose Const. Co. v. B.T.C.T. Council of Phila.*, 449 Pa. 194, 198, 296 A.2d 504, 508 (1972), cert. denied, 411 U.S. 932 (1973).

[9] *Hirsch v. Building & Constr. Trades Council of Phila.*, (E.D. Pa. C.A. Nos. 75-646-647), *aff'd*, 530 F.2d 298. (3rd Cir. 1976).

[10] See infra at n. 75-79 and accompanying text.

found it more difficult to obtain performance bonds for its projects and did not receive some jobs even though it had been the low bidder. Some business associations cancelled reservations for use of the Sheraton Hotel in the Valley Forge complex because of their union sympathies.

The union actions against other general contractors who are members of the ABC were similar in kind to those experienced by Altemose. Union sponsored picketing pressured general contractors to utilize union subcontractors; the union pressure directed at these general contractors was to replace non-union with union subcontractors on the Council's "fair" list. Union pressure was also directed toward suppliers of material and capital (i.e., investors and financial institutions) to convince them to withdraw support for the projects. It cannot be denied that the Council's actions in a sense protected union employers as well as its union members.

Count I of the complaint alleges that the unions have conspired with non-labor entities—unnamed co-conspirators (i.e., union employers, suppliers, developers)—to force non-union general contractors and subcontractors out of the Philadelphia construction market and create a monopoly of union contractors in violation of Sections 1 and 2 of the Sherman Act.[11] The plaintiffs

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[11] Section 1 of the Sherman Act (15 U.S.C. § 1) provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 2 of the Sherman Act (15 U.S.C. § 2) provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to

contend that the unions have combined with employers of union labor in a concerted effort to control the product-market for construction services by using secondary tactics [12] to force general contractors to execute industry-wide subcontracting agreements providing for the exclusive use of union labor. The subcontracting agreements require the general contractor to subcontract work only to subcontractors who are parties to collective bargaining agreements with the union. The unions and union contractors are alleged to have agreed to impose direct restraints on competition in the market for construction services that restrict the construction industry's size, allocate the market and create a geographical enclave for union employers. Such conspiratorial activities without legitimate labor objectives and with predatory intent may be a violation of the antitrust laws. *Allen Bradley Co. v. Local No. 3*, 325 U.S. 797 (1945). See also, *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

Count II alleges that the unions have conspired among themselves to restrain trade and monopolize the construction market through the use of the subcontracting agreements to force non-union employers out of the market and protect the unions and their members. Antitrust lia-

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monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

[12] Pressure exerted upon the employer with whom the union has a labor dispute is "primary," and lawful; pressure exerted on a neutral third party in his relations with the primary employer is "secondary," and unlawful, under § 8(b)(4) of the National Labor Relations Act. See, St. Antoine, Secondary Boycott: From Antitrust to Labor Relations, 40 Antitrust L.J. 242 (1971); Lesnick, Job Security and Secondary Boycotts: The Reach of NLRA §§ 8(b)(4) and 8(e), 112 U. Pa. L. Rev. 1000 (1965); R. Gorman, Labor Law Text, 240 (1976).

bility is allegedly imposed by the use of illegal methods having substantial anti-competitive effects in the product market to achieve otherwise legitimate objectives (i.e., standardization of wage and working conditions). See *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975). Plaintiffs argue that even if this is union conduct ordinarily legal under the labor laws, it is here subject to antitrust attack because the anti-competitive effects outweigh the benefits sought to be achieved by the labor laws. See *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 678 (1965).

Because of these practices engaged in by the defendants and their effect on the construction industry, Altemose alleges that it is prevented from bidding for construction work in Philadelphia County. The association plaintiffs claim that the union tactics are designed to force non-union labor out of the industry, increase construction costs and injure their business in violation of the Sherman Act. Defendants assert the union objective was to organize and obtain recognition and that this conduct was immune from antitrust liability by statute and case law.[13]

The issues are: (1) whether liability is imposed under the teaching of *Connell Construction Co.*, supra, where unions use picketing and secondary pressure to obtain subcontracting agreements but do not succeed; (2) whether *Connell* is applicable when unions seek to orga-

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[13] Dean St. Antoine describes this conflict between the labor and antitrust laws as an "intractable" problem. St. Antoine, Connell: Antitrust at the Expense of Labor Law, 62 Va. L. Rev. 603 (1976). Professor Winter concludes that the conflict between antitrust and labor policies is "so irreconcilable that . . . the regulatory distinctions employed must be largely arbitrary—there are no general principles by which these policies can be harmonized." Winter, Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities, 73 Yale L.J. 14, 16-17 (1963). See also, Cox, Labor and the Antitrust Laws—A Preliminary Analysis, 104 U. Pa. L. Rev. 252, 254-55 (1955).

nize the employees of a general contractor, and (3) whether there is sufficient probative evidence of a conspiracy between the unions and non-labor entities to present a jury question.

II. STANDARDS GOVERNING SUMMARY JUDGMENT

Cross-motions for summary judgment do not warrant the grant of summary judgment to either party unless one of them is entitled to judgment as a matter of law upon material facts not in genuine dispute. See *Manetas v. International Carriers, Inc.*, 541 F.2d 408 (3rd Cir. 1976).

In *Sunshine Books, Ltd. v. Temple University*, 697 F.2d 90 (3rd Cir. 1982), the Court of Appeals summarized the law as follows:

> Rule 56 of the Federal Rules of Civil Procedure provides that a trial court may enter summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." We have characterized summary judgment as " 'a drastic remedy' ", and have made clear "that courts are to resolve any doubts as to the existence of genuine issues of fact against the moving parties." *Ness v. Marshall*, 660 F.2d 517 at 519 (3d Cir. 1981) (quoting *Tomalewski v. State Farm Life Insurance Co.*, 494 F.2d 882, 884 (3d Cir. 1974). Moreover, "[i]nferences to be drawn from the underlying facts contained in the evidential sources submitted to the trial court must be viewed in the light most favorable to the party opposing the motion." *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976), cert. denied, 429 U.S. 1038, 97 S.Ct. 732, 50 L.Ed. 2d 748 (1977)) . . .

Id. at 95 (quoting *Hollinger v. Wagner Mining Equip. Co.*, 667 F.2d 402, 405 (3rd Cir. 1981). While the Supreme Court has cautioned that summary judgment should be used sparingly in antitrust cases,[14] summary adjudication may be granted even in these complex cases. See *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 513 F.Supp. 1100, 1140 n.53 (E.D. Pa. 1981), appeal docketed, Nos. 81-2331, 81-2332 and 81-2333 (3rd Cir. August 24, 1981). See also, *Mid-South Grizzlies v. National Football League*, 550 F.Supp. 558 (E.D. Pa. 1982); *American Structures v. Fidelity & Deposit Co.*, 545 F.Supp. 1021 (E.D. Pa. 1982).

But it is the movant's burden to show the absence of a genuine issue of material fact. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970). This burden of proof can be satisfied by affidavit or otherwise as provided in Fed. R. Civ. P. 56(e).[15] When a motion for summary judgment is properly supported, Fed. R. Civ. P. 56(e) "makes it clear that 'an adverse party may not rest upon his pleading' . . . '[I]t is incumbent upon the plaintiff to produce significant probative evidence demonstrating that a genuine issue of fact exists'. . . ". *Sunshine Books Ltd. v. Temple University*, supra, 697 F.2d at 96 (quoting *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 554 (5th Cir. 1980), cert. denied, 454 U.S. 927 (1981).[16]

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[14] See *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962). One commentator has suggested that the *Poller* case rests on certain assumptions about the evidence in the case and its application to the substantive antitrust principles involved. Thus, "the often quoted general language of *Poller* is in itself no barrier to summary judgment." P. Areeda & D. Turner, Antitrust Law § 316 at 62 (1978). Even so the case has become a "magic wand waved indiscriminately by those opposing summary judgment motions in antitrust actions." *Mutual Fund Investors, Inc. v. Putnam Management Co.*, 553 F.2d 620, 624 (9th Cir. 1977).

[15] See *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, supra, 513 F.Supp. at 1118 n. 3.

[16] *Pan-Islamic* involved sworn denials of any conspiracy. We are faced with the same question here. See also, *Parsons v. Ford Motor*

Failure to discharge this burden requires the grant of summary judgment despite a party's right to trial.[17] A party should not be allowed to proceed in the hope of developing evidence at trial to support his claims. *Parsons v. Ford Motor Co.*, 669 F.2d 308, 313 (5th Cir. 1982), cert. denied, 103 S.Ct. 73 (1983).

III. SHERMAN ACT §§ 1 & 2 CLAIMS

A. *Jurisdiction and Standing*

The defendants challenge both the interstate commerce connection of the activities complained of and standing of the plaintiffs to contest the alleged restraints.

It is clear that the interstate commerce nexus is a prerequisite for federal jurisdiction and an element of the substantive claim under the Sherman Act. See *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 742 n. 1 (1976).[18] The Sherman Act reaches "to

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Co., 669 F.2d 308, 313 (5th Cir. 1982), cert. denied, 103 S.Ct. 73 (1983) (plaintiff's failure to present significant probative evidence of conspiracy in response to defendant's sworn denials warrants summary disposition) and *Zenith Radio Corp. v. Matsushita*, supra.

[17] Summary disposition avoids an often expensive and needless trial on the merits. See *Lupia v. Stella D'Oro Biscuit Co., Inc.*, 586 F.2d 1163, 1167 (7th Cir. 1978), cert. denied, 440 U.S. 982 (1979); *Zweig v. Hearst Corp.*, 521 F.2d 1129, 1135-36 (9th Cir.), cert. denied, 423 U.S. 1025 (1975).

[18] The jurisdictional reach of the Sherman Act "extends to both activities that are actually *in* interstate commerce and to activities that, though purely intrastate in character, nevertheless, substantially *affect* interstate commerce." *Cardio-Medical Assoc. v. Crozer-Chester Med. Ctr.*, 536 F.Supp. 1065, 1073 (E.D. Pa. 1982) (emphasis in original). Because we assume that the plaintiffs' activities are intrastate in nature, our discussion is confined to the interstate ramifications of the restraint. The procedural contours and jurisdictional anomalies of the interstate commerce question are discussed in *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F.Supp. 1161, 1171 n. 21-77 (E.D. Pa. 1980) and need not be reiterated here.

the utmost extent of [Congress'] constitutional power." *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533, 558 (1944). The test focuses on the impact of the anticompetitive behavior on interstate commerce.[19] See *Manderville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219 (1948). In *McClain v. Real Estate Bd.*, 444 U.S. 232 (1980), the Court concluded that to establish the requisite interstate nexus, it is only necessary that the alleged restraint "be shown 'as a matter of practical economics' to have a not insubstantial effect on the interstate commerce involved." Id. at 246 (quoting *Hospital Building Co. v. Rex Hospital Trustees*, supra, 425 U.S. at 745). Applying this test in the light most favorable to the plaintiffs, we find the requisite effect on interstate commerce present. The foreclosure of the construction market resulting from the alleged restraint would force those construction contractors affected to seek projects in other areas of the interstate market.[20] It would also reduce the amount of construction materials and goods supplied to contractors through interstate commerce. Moreover, the record shows that a combination of out-of-state developers and financiers provided consulting and financial support for the projects involved herein. Both the direct ramifications of the alleged restraint and its ancillary consequences involve a not insubstantial amount of interstate commerce. See *Hospital Building Co. v. Trustees of Rex Hospital*, supra, 425 U.S. at 745-46.[21]

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[19] On the history of the interstate commerce connection, see P. Areeda and D. Turner, supra at n. 14, Vol. I at 228-340.

[20] Altemose does business in other states and purchases materials from out-of-state suppliers.

[21] Chief Judge Emeritus Lord's persuasive analysis of *Hospital Building*, supra in *Cardio-Medical Assoc. v. Crozer-Chester Med. Ctr.*, 552 F.Supp. 1170, 1203 (E.D. Pa. 1982) supports our conclusion. In *Cardio-Medical*, Judge Lord noted, while distinguishing the facts before him, that *Hospital Building* involved a substantial interstate commerce nexus through the interstate purchase of build-

The defendants attack the standing of both Altemose and the association plaintiffs. Defendants argue that the alleged market foreclosure affected only subcontractors rather than Altemose as the general contractor. We view this argument as foreclosed by *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975). See *Associated General Contractors of Calif., Inc. v. Calif. State Council of Carpenters*, —— U.S. ——, 103 S.Ct. 897, 910 n. 44 (1983). The loss of business from higher labor costs is a sufficiently direct antitrust injury to establish standing under the factual matrix test adopted in this circuit. See *Midwest Paper Products v. Continental Group*, 596 F.2d 574, 582-83 (3rd Cir. 1979); *Bogus v. American Speech & Hearing Ass'n.*, 582 F.2d 277, 282 (3rd Cir. 1978).

The standing of the Chamber and ABC as associations bringing suit on behalf of their members is determined by applying the factors set forth in *Hunt v. Washington Apple Comm.*, 432 U.S. 333 (1977). "[W]e have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of the individual members in the lawsuit." [22] Id. at 343.

To the extent that the plaintiff associations challenge the general pattern of union conduct in securing these

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ing supplies and financing. Accord, *Schnabel v. Building Trades Council of Phila., Etc.*, C.A. No. 82-2256, Slip. Op. at 28 (E.D. Pa. April 13, 1983). Because we have analyzed the nexus between the alleged restraint and interstate commerce and found that jurisdiction is established, we need not delve into the academic quandary rooted in a more liberal reading of *McClain*. See e.g., *Pao v. Holy Redeemer Hospital*, 547 F.Supp. 484, 488-89 (E.D. Pa. 1982).

[22] The Court quoted extensively from *Worth v. Seldin*, 422 U.S. 490, 511-12 (1975). Accord, *Phila. Citizens in Action v. Schweiker*, 669 F.2d 887, 880 n. 1 (3rd Cir. 1982).

subcontracting agreements, the standing requirements are satisfied. Any challenge not to the agreements as anti-competitive *per se* but to the *particular* conduct of the unions in securing a specific subcontracting agreement from a particular contractor requires joinder as plaintiff the individual contractor; the organizational intent of the unions as to each individual contractor would be critical.[23] The association plaintiffs cannot fulfill the third requirement of the Court's standing test and do not have standing to assert charges on behalf of specific contractors.

Plaintiffs have alleged two distinct types of conspiracies as violative of both Sections 1 & 2 of the Sherman Act.[24] The conspiracy averred in Count I is an illegal combination of the labor defendants with union contractors, suppliers, and lending institutions to restrain trade in and monopolize the construction market. Although identical in purpose and market effect, the conspiracy alleged in Count II is among the labor defendants only.

The elements of a claim under Section 1 of the Sherman Act have been set forth by the Third Circuit:

> In order to sustain a cause of action under § 1 of the Sherman Act, the plaintiff must prove: (1) that the defendants contracted, combined or conspired among each other; (2) that the combination or conspiracy produced adverse, anti-competitive effects within relevant product and geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiff was injured as a proximate result of that conspiracy. . . .
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> Unless the particular restraint falls within a category that has been judicially determined to be illegal

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[23] See infra at p. 26.

[24] See supra at pp. 8-12.

> per se, the legality of a restraint challenged under § 1 of the Sherman Act must be assessed under the rule of reason. Under the rule of reason standard, only those restraints upon interstate commerce which are unreasonable are proscribed by § 1 of the Sherman Act.[25]

Martin B. Glauser Dodge Co. v. Chrysler Corp., 570 F.2d 72, 81-82 (3d Cir. 1977), cert. denied, 436 U.S. 913 (1978) (citations omitted).

In addition to the dual conspiracies to restrain trade in violation of Section 1, plaintiffs have alleged two distinct conspiracies to monopolize in violation of Section 2. See *Zenith Radio Corp. v. Matshushita Elec. Indus. Co.*, supra, 513 F.Supp. at 1319. A conspiracy to monopolize requires, (1) "proof of concerted action deliberately entered into with the specific intent to accomplish the unlawful result of achieving a monopoly;" and (2) proof of "at least one overt action in furtherance of the conspiracy." L. Sullivan, Handbook of Antitrust Law 132-33 (1977). "Proof of such a conspiracy does not require successful accumulation of monopoly power." *Zenith Radio Corp. v. Matshusita Elec. Indus. Co.*, supra, 513 F.Supp. at 1319.[26] These claims, like those under Section 1, also require proof of illicit concerted action or com-

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[25] Although the plaintiffs argue that the conduct in this case is a species of group boycott which requires application of the *per se* rule under *Klors, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), the recent decision in *Muko II* suggests otherwise. *Larry V. Muko, Inc. v. Southwestern Pa., Etc.*, 670 F.2d 421 (3rd Cir.), cert. denied, 103 S.Ct. 229 (1982).

[26] Attempted monopolization by combination is discussed in *American Tobacco v. United States*, 328 U.S. 781 (1946). As stated by Professor Sullivan, "there is a substantial area of potential overlap between the offenses of conspiracy to restrain trade, conspiracy to monopolize . . ." Sullivan, Antitrust, supra at 133. Professors Areeda and Turner find any attempted distinction between conspiracies under Sections 1 & 2 redundant. P. Areeda and D. Turner, supra, n. 14 at 358.

bination. In practice, the conspiracy claims under Sections 1 & 2 in both counts are supported by similar, if not identical, evidence. Id. at 1320. See *Edward J. Sweeney & Sons v. Texaco*, 637 F.2d 105, 118 (3rd Cir. 1980). The combinations which plaintiffs allege to support the conspiracies to monopolize violating Section 2 are the same combinations alleged to be a restraint of trade violating Section 1; therefore, a failure of proof regarding the existence of concerted action and unity of purpose on the Section 2 claims condemns the claims under Section 1 as well.

B. *Count II—Exclusivity of Labor Law Remedies for Unilateral Union Activities—Impact of* Connell

Labor's partial exemption from the antitrust laws represents an attempt of both Congress and the courts to reconcile the conflicting policies expressed in the labor and antitrust laws. In labor-antitrust cases, we must first determine whether the labor exemption is applicable and, if the conduct is not exempt, then determine liability under traditional antitrust principles. See *Larry V. Muko, Inc. v. Southwestern Pa., Etc.*, 670 F.2d 421, 427 (3rd Cir. 1982) cert. denied, 103 S.Ct. 229 (1982) ("Muko" II). Because the defendants argue that both statutory and non-statutory exemptions apply to the conduct at issue, it is necessary to explore the Court's recent pronouncement in the construction industry context.

In *Connell Construction Co. v. Plumbers and Steamfitters Local 100*, 421 U.S. 616 (1975),[28] the Court, divid-

[28] Professor Handler has called *Connell* the "principal culprit" in making the treatment of labor unions under the antitrust laws one of the most frustrating areas of antitrust jurisprudence. Handler, Reforming the Antitrust Laws, 82 Colum. L. Rev. 1287, 1339 (1982). The decision has been severely criticized for its disconcerting impact in the field. See King & Smith, New Antitrust Developments Affecting Labor Law, 33 Syracuse L. Rev. 945, 985-93 (1982);

ing 5-4, reversed a judgment for union defendants on the ground that a subcontracting agreement was exempt from federal antitrust law; it held that a subcontracting agreement, "which is outside the context of a collective bargaining relationship and not restricted to a particular jobsite, but which nonetheless obligates a [general contractor] to subcontract work only to firms that have a contract with [the trade union]", stated a cause of action under federal antitrust law. Id. at 635. The case was remanded for consideration of whether the agreement did in fact violate the Sherman Act.

In *Connell*, Local 100, a bargaining representative for the plumbing and mechanical trades in Dallas, sought to compel general contractors to agree that in letting subcontracts for mechanical work they would deal only with firms that were parties to the union's current collective bargaining agreement. The union disclaimed any interest in representing the general contractors' employees. When Connell, a general contractor, refused to sign such an agreement, the union positioned a single picket at one major construction site whereupon construction at the site came to a halt. Connell filed suit in state court to enjoin the picketing, and the union removed the case to federal court. Connell signed the union agreement under protest and amended its complaint to claim the agreement violated Sections 1 and 2 of the Sherman Act. The union defended on the ground that its labor activities were exempt from the antitrust laws.

Justice Powell, writing for the majority, acknowledged two types of labor exemption from operation of the anti-

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Handler and Zifchak, Collective Bargaining and the Antitrust Laws: The Emasculation of the Labor Exemption, 81 Colum. L. Rev. 459 (1981); Casey and Colzillio, Labor-Antitrust: The Problems of Conneli and a Remedy That Follows Naturally, 1980 Duke L. J. 235 (1980); Supreme Court, 1974 Term, 89 Harv. L. Rev. 234 (1975). See also, *Muko v. Southwestern Pa., Etc.*, (Muko I) 609 F.2d 1368, 1377 (3rd Cir. 1979) (Aldisert, J., dissenting).

trust laws. First, the statutory exemption provided by the Clayton and Norris-LaGuardia Acts protects unilateral union activity such as secondary picketing and boycotts.[29] Second, there is a nonstatutory exemption, which "has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions". 421 U.S. at 622.

The executed union-subcontractor agreement with Connell was a union combination with the employer, a nonlabor entity; the Court held that the statutory exemption accorded labor organizations did not apply. Addressing the non-statutory exemption,[30] the Court found that the agreements excluded non-union subcontractors from a portion of the market even if their competitive advantages were not derived from substandard wages and working conditions but rather from more efficient operating methods. Because the agreements imposed direct restraints on the product market not following naturally from the elimination of competition over wages and working conditions, it contravened antitrust policy to a degree not justified by labor policy and the nonstatutory exemption was not available.

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[29] The statutory exemption is grounded in § 6 and § 20 of the Clayton Act (15 U.S.C. § 17; 29 U.S.C. § 52) and §§ 4, 5, 13 of the Norris-LaGuardia Act (29 U.S.C. §§ 104, 105, 113) which declare that labor unions are not combinations in restraint of trade and exempt specific union activities from the operation of the antitrust laws. See infra at n. 37. See also *United Mine Workers v. Pennington*, 381 U.S. 657, 661-62 (1965); *Muko I*, supra 609 F.2d at 1372.

[30] Labor policy contemplates some lessening of business competition by the elimination of competition regarding wages and working conditions. See *United Mine Workers v. Pennington*, 381 U.S. 657, 666 (1965); *Meat Cutters v. Jewel Tea Co.*, 318 U.S. 676, 692-93 (1965). For a history of the non-statutory exemption see *Consol. Exp. Inc. v. N.Y. Shipping Assn.*, 602 F.2d 494, 513-15 (3rd Cir. 1979), vacated, 448 U.S. 902 on remand 641 F.2d 90 (3rd Cir. 1980), mandamus and prohibition denied, sub. nom., In re Int'l Longshoreman's Assn., 451 U.S. 905 (1981) (hereinafter *Conex*).

The Court then considered the union's argument that the agreement was specifically allowed by the construction industry proviso to Section 8(e) of the National Labor Relations Act (hereinafter NLRA).[31] The Court held that Section 8(e) extends only to agreements in the context of collective bargaining relationships and "possibly common-situs relationships on particular jobsites." 421 U.S. at 633. Finally, the Court held that the remedies under the NLRA for violation of Section 8(e) were not exclusive. Thus, an antitrust suit based on illegal hot cargo agreements was not inconsistent with the remedial scheme of the NLRA.

Justice Stewart, joined by Justices Douglas, Brennan, and Marshall, dissented on the ground that the union's conduct was regulated solely by the NLRA and was immune from federal antitrust prosecution because Congress intended the labor laws to provide the exclusive remedies for the unlawful conduct alleged by Connell.[32]

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[31] 29 U.S.C. § 158(e) (1976). Section 8(e) provides that:

> [i]t shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express on implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void. . .

The construction industry proviso to this subsection, however, exempts from its operation any agreement "between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work. . . ." *Id.*

[32] Both the majority opinion and the dissent in *Connell* apparently agreed that Congress rejected the use of antitrust sanctions to curb secondary union activities when it considered revising the NLRA in 1947. Compare 421 U.S. at 634 & n. 15 (Powell, J.) with id. at 641 (Stewart, J. dissenting). Justice Powell found that this legislative choice had no relevance to the issue whether Congress

Justice Douglas in a separate dissent emphasized that Connell failed to allege or prove any conspiracy between the union and the other unionized subcontractors. This infirmity in the complaint in his view placed the union's conduct under the exclusive purview of the labor laws.

The Court majority held the statutory exemption inapplicable because the union agreement was with a non-labor party. It is not clear if the Court was referring to the union-Connell agreement alone or to the union agreements with Connell and other general contractors. It seems more likely that the Court viewed the union-Connell agreement itself an antitrust combination [33] and held that the statutory exemption applied only to a union acting alone and not to any union-non-labor agreement.[34]

In considering the claim of non-statutory exemption, the Court pointed to three significant factors in finding the direct restraint imposed by the subcontracting agreement had substantial anticompetitive effects not flowing from legitimate labor concerns. First, the union had no interest in representing Connell's employees so that the congressional policy in favor of collective bargaining was not implicated. 421 U.S. at 626. This takes the agreement outside of the scope of the construction industry proviso of § 8(e) of the NLRA as well. *Id.* at 633.

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intended to preclude antitrust attack when hot cargo agreements were forbidden as unfair labor practices by the Landrum-Griffin amendments to the NLRA enacted in 1959. 29 U.S.C. § 158(e) (1976). See 421 U.S. at 634.

[33] The complaint alleged that the subcontractor agreement violated §§ 1 & 2 of Sherman. 421 U.S. at 620-21. Moreover, immediately prior to the conclusion of the opinion, the Court stated that "the union's agreement with Connell is subject to the federal antitrust laws." Id. at 635.

[34] This assumes that a union-employer agreement is not necessarily immune from antitrust sanctions because the union's unilateral action to secure it was immune. See St. Antoine, supra n. 13, at 614.

The Court pointed out that in a collective bargaining context, labor law safeguards contained in Sections 8(b)7 and 8(b)(4)(b) come into play, but "[T]hese careful limits on the economic pressure unions may use in aid of their organizational campaigns would be undermined seriously if the provision to § 8(e) were construed to allow unions to seek subcontracting agreements, at large, from any general contractor vulnerable to picketing." 421 U.S. at 633. See also, *Woelke & Romero Framing, Inc. v. NLRB*, —— U.S. ——, 102 S.Ct. 2071, 2082 n. 16 (1982). Because the union did not seek to represent the general contractor's employees in collective bargaining, labor law protections were not present and antitrust laws applied.

Second, the multi-employer collective bargaining agreement with subcontractors which the union action against Connell sought to protect contained a "most favored nation" clause by which the union agreed that if it granted a more favorable contract to any employer it would extend those terms to all other member subcontractors. In this manner, the unionized subcontractors would be protected from competition on all subjects covered by the multi-employer agreements, even if unrelated to wages and working conditions. Third, because the subcontractor agreements prohibited contracting with any firm that did not have a contract with Local 100, the union had the power to control access to the market. This the Court said gave the union the ability to create a geographical enclave for local contractors.

Although the broad *dicta* can be read to subject all coercive union action excluding non-union firms from the subcontracting market to the antitrust laws, the aforementioned factors limit the actual holding of *Connell*. In this case, it is undisputed that Altemose did not actually sign any subcontractor agreement as did the plaintiff in *Connell*. Altemose argues that it should not have to sign an agreement with the identical market

effects as those in *Connell* to validate its claim under the antitrust laws and that *Connell* forbids any direct restraints on the product market that benefit a favored employer group even when achieved by unilateral union conduct. Its claim in essence is that *Connell* proscribes action by unions among themselves to secure the type of subcontracting agreements declared unlawful in that case, or alternatively, that the antitrust laws also interdict secondary union pressure to secure a lawful "hot-cargo clause." [35] This overextends the holding in *Connell* [36] and ignores the remedial scheme of the Taft-Hartley and Landrum-Griffin Amendments to the labor laws. The conduct alleged in Count II is without antitrust significance.

1. *Statutory Exemption Viewed in Conjunction with the Labor Laws.*

The statutory labor exemption originates in the Clayton Act, 15 U.S.C. § 17 and 29 U.S.C. § 52, and the Norris-LaGuardia Act 29 U.S.C. §§ 104, 105 and 113. *Connell*, supra, 421 U.S. at 621-22. Section 6 of the Clayton Act, 15 U.S.C. 17, provides:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid

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[35] The Supreme Court in *Connell* left this question open. 421 U.S. at 684 n. 14.

[36] Although the Court did refer to the other agreements with general contractors and the multi-employer collective bargaining agreement to assess the effect on the product market, it specifically noted that Connell did not argue the case on a conspiracy between the union and unionized subcontractors. The Court focused exclusively on the executed agreement with Connell in its statement of the holding. 421 U.S. at 625 n. 2 and 635.

> or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Section 20 of the Clayton Act prohibits the courts from enjoining specified acts by employees that occur in the course of disputes "concerning terms or conditions of employment," and states that these acts cannot be "held to be violations of any law of the United States." 29 U.S.C. § 52.

The Norris-LaGuardia Act re-emphasizes and further expands the intended scope of the labor exemption. The Act prohibits injunctions against employees engaged in various activities during a labor dispute, even where a claim of an unlawful combination or conspiracy is made.[37] The right to bargain collectively is specifically protected.[38] Although the Act does not by its terms pro-

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[37] As under the Clayton Act, the specified activities are protected only in the context of a labor dispute. A *labor dispute* is defined by the Norris-LaGuardia Act as including "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment regardless of whether or not the disputants stand in the proximate relations of employer and employee." 29 U.S.C. § 113(c). Contrary to the arguments advanced by the plaintiffs, we have no difficulty in finding that the parties were engaged in a labor dispute within the meaning of § 113(c). See *Marine Cooks & Stewards v. Panama Steamship Co.*, 362 U.S. 365 (1960); *NLRB v. Rice Milling Co.*, 321 U.S. 665 (1951); *Utilities Ser. Eng. v. Colo. Bldg. & Const. Trades*, 549 F.2d 173, 176-77 (10th Cir. 1977).

[38] 29 U.S.C. § 102 provides:

> Whereas under prevailing economic conditions . . . the individual unorganized worker is commonly helpless to exercise actual liberty or contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline

vide a labor exemption from antitrust laws, "it has been interpreted broadly as a statement of congressional policy that the courts must not use the antitrust laws as a vehicle to interfere in labor disputes." *H. A. Artists & Associates v. Actors' Equity Association*, 451 U.S. 704, 714 (1981). See Sullivan, supra at 723.

The seminal case regarding the statutory exemption is *United States v. Hutcheson*, 312 U.S. 219 (1941).[39] *Hutcheson* involved a nationwide jurisdictional dispute between the Carpenters' and the Machinists' unions. Pursuing its jurisdictional objective, the Carpenters struck and picketed the Anheuser-Busch Brewing Company, picketed another company located next to Anheuser-

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to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his own employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerteed activities for the purposes of collective bargaining or other mutual aid or protection.

[39] The first case to employ a species of the statutory exemption was *Milk Wagon Drivers, Union Local 753 v. Lake Valley Farm Products, Inc.*, 311 U.S. 91 (1940). There the Court noted that federal courts did not have jurisdiction to grant injunctions in cases involving labor disputes under the Norris-LaGuardia Act even though a secondary boycott in violation of the Sherman Act was alleged. Id. at 103. In *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 60 S.Ct. 982, 84 L.Ed. 1311 (1940) the Court discussed the Clayton and Norris-LaGuardia Act provisions, but decided that the conduct did not violate the terms of the Sherman Act. Thus, it was not necessary to examine the statutory exemption. See *Mid-American Reg. Bar. v. Will County Carpenters District Council*, 675 F.2d 861, 865 n. 11 (7th Cir.), cert. denied, 103 S.Ct. 132 (1982). *Apex* is sometimes considered the origin of the non-statutory exemption because the union's goal of the elimination of price competition based on the differences in labor standards was not the type of restraint in price competition prohibited by the Sherman Act. See, *Conex*, supra, 602 F.2d at 513-14.

Busch on land leased from Anheuser-Busch, and asked union members and their friends for a national boycott of Anheuser-Busch beer. Officers of the Carpenters were charged with a criminal violation of the Sherman Act.[40]

The Court found no antitrust violation. It rejected the Government's argument that strikes growing out of jurisdictional disputes are Sherman Act violations:

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 of the Clayton Act are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

Id. at 232 (footnote omitted). The Court then considered whether the picketing of Anheuser-Busch and its tenant and the call for a consumer boycott was within the immunity granted to labor unions by Section 20 of the Clayton Act and reasoned that this conduct was lawful unless the enlistment of employees of other employers made it a violation. The Court held there was antitrust immunity[41] by reading in the Clayton Act the Norris-LaGuardia Act's definition of a labor dispute which applies "regardless of whether or not the disputants stand in the proximate relation of employer and employee."[42] In the Court's view the Sherman, Clayton, and Norris-LaGuardia Acts, read together, provide "a harmonizing text of outlawry of labor conduct."[43] As recently emphasized by the Court "under *Hutcheson*, no federal injunction may issue over a 'labor dispute', and § 20 [of the Clayton Act] removes all such allowable con-

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[40] 312 U.S. at 220.

[41] Id. at 232-37.

[42] 29 U.S.C. § 113(c) (1976).

[43] 312 U.S. at 231.

duct from the taint of being a violation of any law of the United States, including the Sherman Act." *H. A. Artists*, supra, 451 U.S. at 715 (quoting *Hutcheson*, 312 U.S. at 236).

The teaching of *Hutcheson*, therefore, is that union actions immune from injunction under the Clayton or Norris-LaGuardia Acts are also immune from antitrust treble damages or criminal prosecutions. *Hutcheson* in effect overruled both *Duplex Printing Press Co. v. Deering* [44] and *Bedford Cut Stone Co. v. Journeymen Stone Cutters Ass'n.* [45] which had previously subjected these union tactics to the antitrust laws. See *National Woodwork Mfg. Ass'n. v. NLRB*, 386 U.S. 612, 623 (1967). *Hutcheson* made clear that these and other forms of secondary pressure were protected by the Norris-LaGuardia Act's definition of "labor dispute" and were free from injunctive restraints; [46] since the conduct was not subject

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[44] 254 U.S. 443 (1921). *Duplex* was a private Sherman Act suit to enjoin a peaceful, nationwide, secondary boycott in aid of organizational efforts at the plaintiff's factory, effected, first, by refusal of union members employed by plaintiff's customers to handle non-union manufactured goods, and second, by inducing customers to cease dealing with the plaintiff.

[45] 274 U.S. 37 (1927). In *Bedford Stone* the Court condemned a union's unilateral refusal to work on plaintiff's non-union quarry stone brought to the construction worksite and held the union's conduct to be an unlawful secondary boycott.

[46] See, e.g., *American Fed'n. of Musicians v. Carroll*, 391 U.S. 99 (1968) (union's pricing practices affecting orchestra leaders involved "labor dispute" and thus were exempt from antitrust); *United States v. American Fed'n of Musicians*, 318 U.S. 741 (1943) (per curiam) (primary and secondary boycott to prevent technological innovation in music industry); *Milk Wagon Driver's Union Local 753 v. Lake Valley Farm Prods., Inc.*, 311 U.S. 91 (1940) (secondary organizational picketing); *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938) (consumer picketing). Cf., *Bakery Sales Drivers Local 33 v. Wagshal*, 333 U.S. 437 (1948) (union boycott in aid of commercial dispute between bakery and retailer enjoined on ground that no labor dispute existed). See also, *American Fed'n of Labor v. Swing*, 312 U.S. 321 (1941) (organizational picketing).

to injunction, it was also immune from the antitrust laws. See *Ramsey v. UMW*, 401 U.S. 302, 313 (1970). After *Hutcheson*, the secondary pressures such as those brought to bear on Altemose in this case were no longer deemed illegal.[47]

Congress enacted the Taft-Hartley Act[48] in 1947 to remedy a perceived imbalance in the labor relations field. In Section 8(b)(4) Congress outlawed pressure tactics

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[47] See *Handler & Zifchak*, supra n. 28 at 477 (citing inter alia) *United States v. American Fed'n of Musicians*, 318 U.S. 741 (1943) (per curiam) (Sherman Act injunction denied against union efforts to prevent use of recorded music in commercial music industry, including attempts to secure hot cargo agreements from employer's; lower court relied upon *Hutcheson* and *Hod Carriers* cases); *United States v. Building & Constr. Trades Council*, 313 U.S. 539 (1941) (per curiam) (Sherman Act indictment against recognitional picketing and refusal to handle materials delivered by rival union certified by NLRB dismissed); *United States v. United Bhd. of Carpenters*, 313 U.S. 539 (1941) (per curiam) (indictment for secondary pressure and product boycott directed at company whose employees had elected rival union as bargaining agent, dismissed); *United States v. International Hod Carriers Dist. Council*, 313 U.S. 539 (1941), aff'd per curiam *United States v. Carozzo*, 37 F.Supp. 191 (N.D. Ill. 1941) (indictment for, inter alia, strikes and threats of strikes to prevent manufacturers of labor saving concrete truck-mixers from selling them to employers in Chicago, dismissed); *Gundersheimers, Inc. v. Bakery Int'l Confectionery Worker's Union*, 119 F.2d 204 (D.C. Cir. 1941) (secondary strike to compel employer to cease importing non-union goods); *ILGWU v. Donnelly Garment Co.*, 119 F.2d 892, modified, 121 F.2d 561 (8th Cir. 1941) (Sherman Act injunction against secondary boycott denied on basis of *Hutcheson*, *Apex*, and *Milk Wagon Drivers*; *United States v. Gold*, 115 F.2d 236 (2d Cir. 1940); *United States v. B. Goedde & Co.*, 40 F.Supp. 523 (E.D. Ill. 1941) (product boycott of non-union-made building materials). The Court has subsequently cited *Hutcheson* as taking all labor disputes as defined by the Norris-LaGuardia Act, outside of the reach of the Sherman Act. *American Fed'n. of Musicians v. Carroll*, 391 U.S. 99, 106 (1968).

[48] Labor Management Relations Act, ch. 120, 61 Stat. 136 (1947) (current version at 29 U.S.C. §§ 141-197 (1976)).

with certain secondary objectives[49] in order to confine labor disputes to the situs of the primary employer.[50] Secondary tactics banned under Section 8(b)(4) may be enjoined upon petition by the NLRB[51] compensatory damages are also available under Section 303.[52] It remained lawful for unions to induce customers of the primary employer to boycott the primary's goods, or to negotiate with secondary employers voluntary agreements (so-called "hot-cargo" agreements) requiring them to boycott the primary employer.[53]

In 1959 Congress passed the Landrum-Griffin Amendments[54] to close loopholes in the Taft-Hartley prohibitions.[55] It became an unfair labor practice to "threaten, restrain or coerce" a person including the secondary employer in furtherance of a proscribed objective.[56] "Hot

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[49] For the changes in the law effected by the Taft-Hartley and Landrum-Griffin Amendments, see gen., *Handler & Zifchak*, supra, n. 28, at 471-75.

[50] 29 U.S.C. § 158(b)4. The section prohibited unions from striking or inducing employees of a neutral, "secondary" employer to strike, to force the secondary employer either to cease dealing with the primary employer target or induce the primary to change his method of business. Thus, "[T]he forms of labor boycotts condemned in Duplex and Beford Stone were for the most part outlawed as a matter of labor law." *Handler & Zifchak*, supra, n. 28, at 472.

[51] § 10(1) of the Taft-Hartley Act, 29 U.S.C. § 160(1).

[52] § 303(b) of Taft-Hartley Act, 29 U.S.C. § 187.

[53] See *Local 1976, United Bhd. of Carpenters v. NLRB* (Sand Door), 357 U.S. 93 (1958).

[54] Labor Management Reporting and Disclosure Act, Pub. L. No. 86257, 73 Stat. 519 (1959) (current version at 29 U.S.C. §§ 158-97, 401-531 (1976)).

[55] *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 633-43 (1967); *NLRB v. Servette, Inc.*, 377 U.S. 46, 51-54 (1964).

[56] Formerly, only inducements directed at the secondary employer's employees were proscribed.

Cargo" agreements[57] and any secondary pressure to secure an unlawful cargo clause were outlawed.[58] Finally, the amendments limited primary picketing with an organizational or recognitional objective[59] and clarified the right of unions to engage in various other practices.[60]

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[57] Section 8(e), of course, contained two provisos which exempted with certain qualifications, agreements negotiated in the construction and garment trades. 29 U.S.C. § 158(e). The Court, however, had found those agreements with primary work preservation characteristics to be lawful. See *National Woodwork*, supra, 386 U.S. at 644-65; *NLRB v. Pipefitters Local 638*, 429 U.S. 507 (1977).

[58] 29 U.S.C. § 158(b)(4)(ii)(A) (1976).

[59] 29 U.S.C. § 158(b)(7). § 8(b)(7)(C) proscribes such picketing for more than thirty days when the union fails to petition for a representation election under § 9(c) of the NLRA, (29 U.S.C. § 159(c)). Only injunctive relief was made available for violations of § 8(b)(7)(c).

[60] See 29 U.S.C. § 158(b)(4)(B) (primary strikes and picketing); § 158(b)(4) (consumer picketing); § 158(b)(7) informational picketing.

The changes effected by Landrum-Griffin, italicized hereinafter, provide that it shall be an unfair labor practice for a union:

> (4)(i) to engage in, or to induce or encourage *any individual employed by any person engaged in commerce or in an industry affecting commerce* to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; *or*
>
> (ii) *to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce,* where *in either case an* object thereof is:
>
> (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to *enter into any agreement which is prohibited by subsection (e) of this section*;
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, *or forc-*

ing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, That nothing contained in this clause (b) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Subchapter: Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity other than picketing, of the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

29 U.S.C. § 158(b)(4) (1976).

Section 303 was amended to include a damage remedy for outlawed secondary pressure. Pressure in the form of strikes, inducements to strike, or coercion to obtain *or* enforce a hot cargo agreement became unfair labor practices under Section 8(b)(4) and remedial by a damage action under Section 303. This is because Section 8(b)(4)(A) makes it illegal to coerce an employer to enter into an agreement violating Section 8(e), and Section 8(b)(4)(B) outlaws secondary pressure to enforce a voluntary hot cargo agreement, whether legal or illegal. However, no Section 303 damages remedy exists for the voluntary execution of an illegal hot cargo agreement; only injunctive relief was made available.[61]

The remedial scheme embodied in the Taft-Hartley and Landrum-Griffin Amendments to the labor laws strictly limited labor's use of secondary activities but left intact its statutory exemption to the antitrust laws for the type of conduct considered in *Hutcheson.* The authorities agree that the legislative history of the Taft-Hartley Act was explicit that its remedies were exclusive with respect to conduct prohibited therein.[62] The legislative history of the Landrum-Griffin Amendments does not contain direct evidence of exclusivity but neither does it suggest that the legislation was intended to resurrect antitrust liability.[63] Congress in Landrum-Griffin provided a deterrent

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[61] See 29 U.S.C. § 160(1).

[62] This conclusion draws support from the overwhelming number of scholars and commentators who have examined the question. See cf. St. Antoine, supra, n. 13 at 603; Handler & Zifchack, supra, n. 28, at 514-15, Handler, Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977, 77 Colum. L. Rev. 979 (1977); Note the Supreme Court, 1974 Term, 89 Harv. L. Rev. 47 at 237 (1975); Note, 21 Vill. L. Rev. 342, 351-353 (1975-76); Note, 61 Cornell L. Rev. 436, 459 (1976). See *Connell, supra,* 421 U.S. at 640-44 (Stewart J., dissenting).

[63] Justice Stewart persuasively argued that the sequence of events occurring during the debate of the bill reveals "unmistake-

to illegal hot cargo agreements by permitting Section 303 damage actions for secondary pressure to obtain or enforce such agreements.

The legislative scheme, when viewed in conjunction with *Connell*, makes clear that absent the execution of a "hot cargo" agreement which is prohibited by § 8(e), mere union pressure or coercion of whatever form is regulated exclusively under the labor laws by Section 8(b)(4) enforcement and damage actions under Section 303.[64] Here, even if the subcontracting agreements sought from Altemose and members of the ABC violated Section 8(e) because no agreement was voluntarily executed, Count II at most alleges violations of the secondary boycott prohibitions of Section 8(b)(4). Union picketing and violence designed to secure an unlawful Section 8(e) agreement would violate Section 8(b)(4)(a) and possibly Section 8(b)(1)(a). The numerous other secondary activities which plaintiffs allege as overt acts in a union-Council conspiracy to force Altemose out of business are also regulated exclusively by the labor laws. Secondary pressure applied against the various *subcontractors, supplier* and *developers*, to force these third parties to bring pressure on the primary employer target Altemose) to accede to union demands, would be a secondary boycott in violation of Section 8(b)(4)(b). And the union's attempts to force existing non-union subcontractors off the job under the subcontracting agreements would violate Section 8(b)(4)(b). As recently stated ". . . the legislative history of Section 8(b)(4) manifests a clear Congressional intention to remedy illegal secondary activities exclusively by way of the labor

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ably" that Congress chose with great care the labor law remedy over the antitrust remedy. 421 U.S. at 634, 651-54.

[64] See *Connell*, 421 U.S. at 634 ("But whatever significance this legislative choice has for antitrust suits based on those secondary activities prohibited by § 8(b)(4), it has no relevance to the question whether Congress meant to preclude antitrust suits based on the 'hot cargo' agreements outlawed in 1959.").

laws. Recovery of treble damages by way of the antitrust laws, for the same illegal activities, is prescripted" at least when the unions act alone. *C & K Coal Co. v U.M.W.*, 537 F.Supp. 480, 503 (W.D. Pa. 1982), aff'd in part, 704 F.2d 690 (3rd Cir. 1983) (citing *Allied Inter. v. Int. Longshoremen's* 640 F.2d 1368, 1381 (1st Cir. 1981)).

The distinction between the facts of this case, where union pressure was used to try to force Altemose to sign the subcontracting agreement, and *Connell*, where the contractor actually did sign the agreement, is decisive. Here the full panoply of remedies under the labor laws, including the damage remedy under Section 303, were available to Altemose and members of the plaintiff associations for union coercion to secure an illegal subcontract agreement or illegal union secondary pressure on third parties. In either case, Section 8(b)(4) proscribed these activities, and the labor laws provide the exclusive remedy.

In *Connell*, because the contractor signed the agreement, Section 303 did not provide a damage remedy for the violation of Section 8(e) itself. Thus, the antitrust remedy was not cumulative[65] and the statutory exemption was inapplicable. But the union conduct in this case which forms the basis for the conspiracy alleged in Count II is regulated exclusively under the labor laws and is statutorily immune from the antitrust laws. See *Allen Bradley v. Electrical Worker*, 325 U.S. 797, 809 (1945); *Hunt v. Crumboch*, 325 U.S. 821, 825 (1945); *Jou-Jou Designs v. Intern. Ladies. Etc.*, 643 F.2d 905, 910 (2nd Cir. 19 cert. denied, 103 S.Ct. 174 (1982); *Utilities Ser. Eng. v. Colo. Bldg. & Const. Trades*, 549 F.2d 173, 178 (10th Cir. 1977); *Iodice v. Calabres*, 512 F.2d 383 (2nd Cir. 1975); *Levering & Garrigues Co. v. Morrin*, 71 F.2d 284 (2nd Cir.), cert. denied, 293 U.S. 595 (1934).

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[65] See *Connell*, supra, 421 U.S. at 634 n. 16.

2. *Non-Statutory Immunity—Existence of a Collective Bargaining Relationship* [66]

Even if the statutory immunity were inapplicable, there is a non-statutory exemption from the antitrust laws for certain activities of organized labor. This is a "shorthand description of an interpretation of the Sherman Act, making that statute inapplicable to restraints imposed in the interest of lawful union monopoly power in the labor market." *Conex*, supra, 602 F.2d at 513. But secondary product or service market restraints such as those sought here must meet a high standard to warrant exemption. Id. at 514. The unions organizational interest furthered by the subcontracting agreements is the justification here claimed. To determine if this confers non-statutory immunity, we must first examine the validity of the conduct under the labor laws.[67] If the conduct is

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[66] Because plaintiffs attack the subcontracting agreements in general as violative of the labor and antitrust laws, the discussion of the collective bargaining relationship created by the agreements under § 8(f) applies to the association plaintiffs as well. See infra at n. 82 and accompanying text. But since the association plaintiffs do not have standing to contest union conduct taken against individual member contractors, only the history of the labor dispute with Altemose is pertinent in determining whether a sufficient collective bargaining context existed to satisfy the criteria of *Connell*.

[67] In *Connell* it is arguable from a reading of the Court's opinion that the antitrust exemption did not turn on the validity of the agreement under § 8(e) because the Court first addressed the exemption question and then proceeded to determine the validity of the agreement under the labor laws. See *Casey, supra* n. 28, at 256 n. 117 (suggesting that the Court would have found no exemption regardless of the outcome of the § 8(e) issue). Whatever academic significance this may have has been laid to rest in *Kaiser Steel Corp. v. Mullins*, —— U.S. ——, 102 S.Ct. 851 (1982). The Court explaining the *Connell* mode of analysis stated "[W]e addressed the § 8(e) issue on the merits and found that § 8(e) did not allow the agreement at issue . . . . [A]s a result, the agreement was subject to the antitrust laws . . . ." Id. at 860. In summary the Court went on "In Connell we decided the § 8(e) issue in the

unlawful under the labor laws, antitrust immunity is probably lost[68] and traditional antitrust analysis follows.[69]

The history and purpose of the construction industry proviso to Section 8(e) is traced in *Pacific Northwest Chapter v. NLRB*, 654 F.2d 1301 (9th Cir. 1981), aff'd in part sub. nom., *Woelke Romero Framing, Inc. v. NLRB*, —— U.S. ——, 102 S.Ct. 2071 (1982). In *Local 1976, United Brotherhood of Carpenters v. NLRB*, (Sand Door),[70] the Supreme Court held a union could not engage in strikes or other concerted activity to enforce "hot cargo" agreements. However, *Sand Door* suggested that

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first instance. It was necessary to do so to determine whether the agreement was immune from the antitrust laws." Id.

[68] In *Conex*, supra, the court stated that a § 8(e) violation automatically precludes recognition of non-statutory immunity. 602 F.2d at 518-19. But in *Muko I* the court retreated from this view suggesting that a § 8(e) violation does not necessarily lead to a finding of non-exemption. *Muko I, supra*, 609 F.2d at 1375. And the court reserved judgment on the effect of a § 8(e) violation standing alone. See discussion Areeda & Turner, supra n. 14, at 82-84.

[69] See *Sullivan*, supra n.27, at 730. *Casey*, supra n. 28, at 272-75. See also, *Berman Enterprises v. Local 333*, 644 F.2d 930, 935-36 (2d Cir. 1981), cert. denied, 102 S.Ct. 506 (1982); *Grandad Bread v. Continental Banking Co.*, 612 F.2d 1105, 1110 (9th Cir. 1979), cert. denied, 101 S.Ct. 854 (1981); *Meat Cutters Local 576 v. Wetterau Foods, Inc.*, 597 F.2d 133 (8th Cir. 1979). The Third Circuit, however, has stated in dicta that an NLRB holding that agreements were legal under the labor laws was "not conclusive on the issue of their illegality under the antitrust laws." *Conex*, supra, 602 F.2d at 519 (quoting *Heat Insulators v. United Contractors*, 494 F.2d 1353, 1354 (3rd Cir. 1974). We view this language appropriate in the context of executed collective bargaining agreements which were at issue in *Conex*. See *Meat Cutters v. Jewel Tea Co.*, supra, 381 U.S. 676.

[70] *United Brotherhood of Carpenters v. NLRB*, 357 U.S. 93 (1958). *Sand Door* was widely interpreted as permitting voluntary "hot cargo" agreements. See supra n. 53.

employers and unions might enter into these agreements that required employees to boycott the goods or services of another party with whom the union had a dispute so long as it was done voluntarily. 357 U.S. at 108. Congress enacted Section 8(e)[71] to eliminate the loopholes for "hot cargo" agreements created by the *Sand Door* decision and to accomodate the special conditions of the construction industry.[72] The intent of Section 8(e) was to preserve the pattern of collective bargaining existing prior to the Landrum-Griffin Amendments as well as reduce labor controversy at the site of the construction project.

In defining the scope of permissible agreements under the construction industry proviso to Section 8(e), the *Woelke Romero* Court stated it was deciding "a question left unresolved in *Connell*: the extent the proviso shelters agreements sought or negotiated within the context of a collective bargaining relationship." 102 S.Ct. at 2076-77

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[71] It must be remembered that § 8(e) with its construction industry proviso was added to the Act by the 1959 Landrum-Griffin Amendments, P.L. 86-257, 23 Stat. 543-544. For the text of 29 U.S.C. § 158(e), see supra at n. 31.

[72] The unique nature of the construction industry is summarized in the Senate Report:

> The occasional nature of the employment relationship makes this industry markedly different from manufacturing and other types of enterprise. An individual employed typically works for many employers and for none of them continuously. Jobs are frequently of short duration, depending upon various stages of construction.

S.Rep. No. 187, 86th Cong., 1st Sess. 27, (1959) U.S. Code Cong. & Admin. News, pp. 2318, 2344; I *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* 423. With its enactment, Congress necessarily chose to tolerate a degree of "top down" pressure for unionization. See *Woelke Romero*, supra, 102 S.Ct. at 2081-82. But the "top down" organizing effect of subcontractor agreements is limited by other provisions of the NLRA when sought in the collective bargaining context. *Id.* See gen., 29 U.S.C. § 158(B)(7)(c); 29 U.S.C. § 158(f).

n. 8. In *Connell*, the unions expressly disavowed any intent to organize or represent employees. 421 U.S. at 619, 631, 639.[73] Because the legislative history of Section 8(e) revealed the Congress believed broad subcontracting clauses were part of the industry collective bargaining pattern prior to the adoption of the Landrum-Griffin Amendment of 1959,[74] the Court held that the construction industry provision to Section 8(e) is not limited to union signatory subcontracting clauses applying to jobsites at which both union and non-union workers are employed, but shelters such clauses so long as they are sought or negotiated in the context of a collective bargaining relationship. Id. at 2083. So the question in this case is whether the agreement can be said to be sought in the context of a collective bargaining relationship.

The NLRB has found with regard to those parties that the union picketing on various occasions was for organizational objectives.[75] On September 9, 1975, an Administrative Law Judge ("ALJ") found that the picketing of Altemose Construction sites which occurred from January 20 through April 23, 1975 and April 23 through May 1, 1975 was for organizational and recognitional objectives;[76] the ALJ inferred an organizational objective

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[73] As previously noted, the *Connell* decision hinged on the absence of a collective bargaining relationship between the union and the general contractor. A number of courts have limited *Connell* to the proposition that a hot cargo agreement, if an unfair labor practice because secured outside of the collective bargaining practice, may be the basis of an antitrust suit. See *Gorgan v. Swanson Painting Co.*, 682 F.2d 807 (9th Cir. 1982); *Donald Schriver Inc. v. NLRB*, 635 F.2d 859 (D.C. Cir. 1980), cert. denied, 451 U.S. 976 (1981). The NLRB general counsel has also taken this position regarding § 8(e). See NLRB Guidelines for handling § 8(e) Construction Industry Proviso Cases under the Supreme Court's *Connell* Decision; 9105 CCH Labor Law Reports.

[74] *Woelke Romero*, supra, 102 S.Ct. at 2080.

[75] See App. Ex. 18 at 476(a).

[76] App. Ex. 18 at 482(a). NLRB Case No. 4-CP-233.

in part from the testimony of Council agent Magrann, and from the resumption of picketing after April 23. Therefore, the ALJ found the union in violation of Section 8(b)(7)[77] and the NLRB upheld this decision including the finding of organizational purpose.[78] Thus, regarding these activities, Altemose is collaterally estopped from denying that the Council's conduct had an organizational purpose.[79]

However, in state court proceedings the trial court found no organizational or recognitional purpose in union conduct occurring at the Valley Forge construction site in 1972. This finding was made on application for preliminary injuctive relief. Under Pennsylvania law there must be preliminary findings to support a court's

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[77] App. Exh. 18 at 486(a).

[78] 222 NLRB No. 198 aff'd mem., 93 LRRM 3025 (3rd Cir. 1976). Moreover, in related cases which are referred to by the plaintiffs the Board found organizational objectives in the picketing. In *Samnoff v. Building Construction Trades Council*, 346 F.Supp. 1071 (E.D. Pa. 1972), rev. on other grounds, 425 F.2d 203 (3rd Cir.), vacated, 414 U.S. 808 (1973), the Board on remand found the picketing violative of § 8(b)(7)(c) because of its recognitional object. See 201 NLRB No. 42 at 203, aff'd mem., 485 F.2d 680 (3rd Cir. 1973). See e.g., *Daniels v. I.G.W.*, 494 F.2d 1230, 1239 (2nd Cir. 1974) (explaining the subsequent history of *Samnoff*); *Samuel Long, Inc.*, 201 NLRB No. 42 at 203 (finding of recognitional objective); *Hirch v. Building & Const. Trades Council, Etc.*, 530 F.2d 298, 304 (3rd Cir. 1976) (finding of organizational purpose).

[79] In *Conex, supra*, 602 F.2d at 503, 511, the court held that a prior judgment of the NLRB was entitled to preclusive effect as to all labor law issues in an antitrust action. Accordingly, the rule of collateral estoppel is applicable to prior administrative proceedings involving these parties, and the adjudicative facts are treated as undisputed for the purpose of this opinion. See *United States v. Utah Const. and Mining Co.*, 384 U.S. 394, 422 (1966). The plaintiffs do not contend that these administrative proceedings were inadequate to fairly present their claims. See *Nasem v. Brown*, 595 F.2d 801, 806-07 (D.C. Cir. 1979); *Jaden Elec. v. Int'l. Broth., Etc.*, 508 F.Supp. 983, 988 (D.N.J. 1981).

determination to issue a temporary injuction but these findings are not conclusive of the rights of any party to the litigation. Pa. R. Civ. P. § 1531(c); 18 P.L.E., Injunction § 108 at 395. On appeal from a decree which grants a preliminary injunction, the Supreme Court will "only look to see if there were any apparently reasonable grounds for the action of the court below, and . . . will not further consider the merits of the case or pass upon the reasons for or against such action . . . ." *Lindenfelser v. Lindenfelser*, 385 Pa. 342, 343, 123 A.2d 626 (1956); *Drum v. Dinkelacker*, 261 Pa. 392, 105 A. 509 (1918). In affirming the grant of the injunction, the Pennsylvania Supreme Court expressly did not decide whether the activities complained of [i.e.: unlawful violent picketing] were protected or prohibited under the labor laws. See *Altemose Construction Co. v. B. & C. T. Council of Philadelphia*, 449 Pa. 194, 203 n. 8, 296 A.2d 504 (1972). Thus, these findings in the state proceedings are not determinative. Because of the organizational objective, the parties were engaged in a labor dispute within the collective bargaining context in 1975. Thus, *Connell* and *Woelke Romero* compel the conclusion that no § 8(e) violation occurred in that time frame.[80] Those

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[80] Furthermore, Form 3 which was then in effect does not prohibit subcontracting to non-union firms as did the agreement in *Connell*; it has an ancillary purpose to organize the general contractor's employees. Any antitrust claim based on Form 3 is without merit.

The unions here at the time of the picketing denied any organizational objective. The unions wanted to picket Altemose as long as they could and § 8(b)(7) limits this right to thirty days. Antitrust consequences from lack of organizational intent in mass picketing was inconceivable in 1972. Subcontracting agreements in the construction trade had been upheld by the courts on numerous occasions even in the absence of a collective bargaining relationship. See *Suburban Tile Center, Inc. v. Rockford Bldg. Trades Council*, 354 F.2d 1 (7th Cir.), cert. denied, 384 U.S. 960 (1966); *Construction Laborers Local 383 v. NLRB*, 323 F.2d 422 (9th Cir. 1963); *Papazian v. Los Angeles Bldg. Trades Council*, 83 L.R.R.M. 2710

activities taken to obtain subcontracting agreements prior to 1975 were also in a collective bargaining context.

In *Donald Schriver, Inc. v. NLRB*, 635 F.2d 859 (D.C. Cir. 1980), cert. denied, 451 U.S. 976 (1981), the court found that an Section 8(f) prehire agreement covering the full conditions of employment of a contractor's own employees was sufficient to satisfy the collective bargaining requirement of *Connell*. The court reasoned that:

> The requirement in *Connell* that there be a collective bargaining relationship only has meaning within its own context. Connell required a collective bargaining relationship to guarantee that a union seeking a subcontracting agreement could not sidestep § 8(b)(7) and apply unlimited secondary pressure on nonunion subcontractors. An attempt by a union to establish an § 8(f) relationship is sufficient to satisfy that concern; a union seeking an § 8(f) agreement covering wages and other terms of employment remains subject to the restrictions of § 8(b)(7). *Dallas Building and Construction Trades Council v. NLRB*, 396 F.2d 677 (D.C. Cir. 1968). Whether an § 8(f) relationship is otherwise deemed to be a "collective-bargaining relationship" is a question totally academic to this case, missing the entire purpose and thrust of *Connell*.

Shriver, supra, 635 F.2d at 875. The court held that a subcontracting agreement sought in the context of an

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(C.D. Cal. 1973); *Los Angeles Bldg. Trades Council* (Fowler-Kenworthy Elec. Co.), 151 N.L.R.B. 770 (1965); *Los Angeles Bldg. Trades Council* (Couch Elec. Co.), 151 N.L.R.B. 413 (1965). Not until the Fifth Circuit's consideration of *Connell* had the issue of whether a collective bargaining relationship was required arisen. *Connell*, supra, 483 F.2d at 1173-74. See also, *Samnoff*, supra, 346 F.Supp. 1071 (E.D. Pa.), rev'd on other grounds, 475 F.2d 203 (3rd Cir. 1973) (Becker, J., picketing to obtain subcontracting agreement legal even absent organizational purpose) (Citing *Essex County Dist. Coun. of Carpenters, Etc. v. NLRB*, 332 F.2d 636 (3rd Cir. 1964).

Section 8(f) prehire agreement does not violate Section 8(e).

Recognizing the concerns expressed in *Shriver* as well as the attendant interests of the employees of the general contractor, the court of appeals has held in related litigation that picketing directed at obtaining a subcontractor agreement is recognitional in nature and, therefore, Section 8(b)(7)(c) limitations are applicable. *Hirsch v. Building & Construction Trades Council, Etc.*, 530 F.2d 298, 303 (3rd Cir. 1976). Altemose, in fact, did resort to Section 8(b)(7) remedies and secured a cease and desist order in 1975.[81] Therefore, the pertinent question is whether Forms 1 and 2 establish a Section 8(f) pre-hire agreement—(i.e., whether they create a sufficient collective bargaining relationship on their face to take this case beyond the ambit of *Connell*).

An organizational purpose is evinced by the agreements themselves. See *Schriver*, supra, 635 F.2d at 868 n. 11. Form 1 has numerous sections. Although the Recognition Section states that the agreement "is not deemed to imply direct recognition . . . under Section 8(b)," [82] this does not preclude its being organizational or recognitional in nature. The Council, of course, does not have members as individual workers but is made up of affiliate unions so that there can be no true § 9 relationship. What the agreement does provide is that all employers on the job site will enter into a collective bargaining agreement with the appropriate craft union. This is accomplished by both the subcontracting obligations section, and the direct obligations section applicable to the general contractor. The text reads:

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[81] See supra at n. 77. It does not appear in the record why Altemose did not resort to a § 8(b)(7) remedy in 1972.

[82] The reference to § 8(b) of the Labor Management Relations Act of 1947 is a misnomer (Representation-elections). We believe the intent was to refer to 29 U.S.C. § 159. Section 8(b), 29 U.S.C. § 158(b) merely refers to unfair union labor practices.

SUBCONTRACTING OBLIGATIONS

1. The Employer agrees to provide in the specifications on doing any business with subcontractors for work on the building or construction job site that such subcontractors as a condition precedent to their commencing work on the job site will enter into collective bargaining agreements with the appropriate craft union member of the Council which is the recognized collective bargaining agent of the particular trade. In no event, will the Employer subcontract any work to any subcontractor who is not in such contractual relations or who does not achieve such contractual relations prior to commencing work.

2. A list of all subcontractors will be posted on the site of the job.

DIRECT OBLIGATIONS

The following obligations of the Employer will apply when contract has been entered into between the Employer and the Council. If, however, it has been deemed necessary by the Council to picket or take other appropriate economic action against the Employer prior to achieving contractual relations, in which even such picketing or other economic action shall be deemed to be taken for the purposes of achieving this collective bargaining agreement only to obtain accord to the portion of this contract referred to as "Subcontracting Obligation."

1. *The Employer*, with reference to work required by him in the industry, agrees to *enter into collective bargaining agreements with only member unions of the Council which are recognized collective bargaining agents for the particular trade* or craft required for the job.

(Emphasis added.)

Under this agreement the employer (general contractor) must enter into a collective bargaining relationship with the respective craft unions. The employer agrees to pay union wages and observe union working conditions, rules and regulations under Para. 3.

> 3. The Employer agrees to abide by all the rules and regulations of the respective trades affiliated with the Building and Construction Trades Council, and to comply with the rates and the specified hours as recognized by the respective trades. In the event that the employer should engage subcontractors to perform such work, then the employer agrees that such subcontractors will observe hours, wages, fringe benefits and working conditions as recognized by the different trades.

Form 1 also contains a grievance procedure [83] and a reference to work stoppages and strikes upon termination.[84]

All the indicia in Form 1 establish the existence of at least a pre-hire agreement under Section 8(f). Its purpose is to initiate a collective bargaining relationship with the general contractor and it establishes enforceable terms concerning the conditions of employment when the general contractor is the employer. It is the first step toward a more specific § 9(a) collective bargaining agreement. The Board has certified this method of convenience bargaining. See *Standard Brands, Inc.*, 175 NLRB No. 122, 71 LRRM 1057 (1969), and pre-hire agreements achieved through this type of bargaining are enforceable in an action under Section 301 of the LMRA, 29 U.S.C. § 185. See *McNeff v. Todd*, —— U.S. ——, 51 U.S.L.W. 4497 (Apr. 27, 1983). It is a method to secure a multicraft contract from a general contractor which would have the "advantage not only of promoting union organizational objectives within a collective bar-

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[83] Enforcement 2.A.

[84] Id. at 2.D.

gaining context, but also of meeting the subsidiary *Connell* test of protecting the union employees of the general contractor from being forced to work with non-union employees." [85] This agreement is far more explicit in organizational purpose than that in *Los Angeles Building Construction Trades Council (B&J Investment Co.)*, 214 NLRB No. 86, 87 LRRM 1424 (1974) [86] which the Court in *Connell* distinguished as a pre-hire contract under Section 8(f). *Connell*, supra, 421 U.S. at 631 n.10. See also, *Schriver*, supra, 635 F.2d at 873 n.22. It is undisputed that Altemose employed workers of the respective trade unions constituting the Council.

Form 2 explicitly requires the general contractor to enter into collective bargaining agreements with member unions of the Council which are recognized collective bargaining agents for the particular craft or trade required for the job and with reference to work required by it. These agreements must contain the Union Security Clause permitted by Section 8(f)(2) of the LMRA. The plaintiffs argue that this is merely an agreement which requires the signatory contractor to enter into a pre-hire agreement *in futuro* and it cannot be a pre-hire contract because the Council is not a labor organization composed of individual laborers. This is too formalistic a reading of Section 8(f). In fact, the NLRB has suggested that the execution with a Building and Trades Council of an agreement including a subcontractor's clause covering existing employees of the general contractor fulfills the criteria for a pre-hire agreement under Section 8(f). See Memorandum of General Counsel on *Connell*, 9105 at 15, 84-85 CCH Labor Reports (1976). These agreements which require an employer to enter into a collective bargaining relationship evince sufficient organizational pur-

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[85] St. Antoine, supra n. 13, at 629-30.

[86] The Board in *B & J Investments* referred to the agreement as a "collective bargaining contract". 214 NLRB at 563.

pose to satisfy the concerns of *Connell*. See *McNeff*, supra, 51 U.S.L.W. at 4500 n.9.

The remaining arguments concerning the legality of the subcontracting agreements can be addressed *seriatim*. First, the particular union requirements of the agreements [87] are not illegal. *Pacific Northwest*, supra, 654 F.2d at 1323. *Shriver*, supra, 635 F.2d at 885. Nor does lack of specification of a particular jobsite in the agreement make them illegal. *Pacific Northwest*, supra, 654 F.2d 1320, aff'd sub. nom., *Woelke Romero*, supra, 102 S.Ct. at 2083; *Schriver*, supra, 635 F.2d at 882. The distribution of a list of subcontractors party to the collective bargaining agreements, the so-called "fair" contractors list, is not an illegal act in regard to Count II; whether some conspiratorial purpose can be inferred in Count I will be discussed hereafter. Finally, Altemose has no standing to challenge the Industry Advancement Fund provided for by any collective bargaining agreements to which it is not a party.[88]

Because the agreements seek to establish terms and conditions of employment for then existing employees of the general contractor, a collective bargaining relationship sufficient to satisfy the concerns of *Connell* is present; the limitations of Section 8(b)(7)(C) are applicable and the agreements do not violate Section 8(e). Such amendments which are legal under the labor law enjoy non-statutory exemption from the antitrust laws. The union conduct alleged in Count II is statutorily immune from challenge under Sections 1 and 2 of the Sherman Act because the alleged conspiracy is in reality unilateral

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[87] See Form I, Subcontracting Obligations 1; Form 2, Employment # (2).

[88] The Industry Advancement Fund to which contributions are made based on employee hours does not have the price fixing implications condemned in *Nat. Elec. Contractors v. Nat. Construction*, 675 F.2d 492, 521 (4th Cir. 1982). Plaintiffs' general assertion of unlawfulness under § 1 of the Sherman Act is without merit.

union activity. Alternatively, the union subcontracting agreements have sufficient organizational intent to establish as a matter of law a collective bargaining relationship which provides sufficient justification for application of the non-statutory exemption to the union activities complained of here.

C. *Count I—Conspiracy with Non-Labor Entities*

In Count I the plaintiffs invoke *Allen Bradley Co. v. Local 3, International Brotherhood of Electrical Workers*, 325 U.S. 797 (1945), in which the Court found that labor's statutory exemption had been forfeited because the union defendant conspired with employers to restrain trade in the product market.[89] Id. at 809. The Court concluded that, "when the unions participated with a combination of businessmen who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Acts." Id. See also, *Philadelphia Record Co. v. Manufacturing Photo-Engravers Ass'n.*, 155 F.2d 799 (3rd Cir. 1946). The plaintiffs allege that the unions have conspired with union employers, developers, suppliers and financial institutions to drive non-union con-

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[89] In *Allen Bradley*, the plaintiffs were non-New York City manufacturers of electrical equipment. The defendant was the local union representing electrical workers in New York City. The plaintiffs challenged industry wide agreements negotiated by the union which provided that contractors would purchase equipment only from city electrical manufacturers and the manufacturer would sell only to contractors employing only union members. The unions obtained these agreements by using labor union methods, such as strikes and boycotts. The effect of these closed shop and hot cargo agreements was to establish a market closed to competition from out-of-state manufacturers. The Court noted that the evidence of conspiracy extended beyond closed shop and hot cargo restraints imposed in the collective bargaining agreements which "standing alone would not have violated the Sherman Act." 325 U.S. at 809.

tractors out of the market for construction services. Under this type of conspiracy to restrain trade in the product market, the unions can claim neither statutory nor non-statutory exemptions to the antitrust laws. See *Conex*, supra, 602 F.2d at 514. The defendants deny the existence of any conspiracy or agreement of the Council and its union members with an employer or non-labor organizations.[90]

1. *Inferring Conspiracy from Circumstantial Evidence*

Because defendants deny any conspiracy, to withstand a motion for summary judgment the plaintiffs must come forward with "significant probative evidence" [91] that the defendants had a "conscious comitment to a common scheme." See *Edward J. Sweeney & Sons v. Texaco, Inc.*, 637 F.2d 105, 111 (3rd Cir. 1980), cert. denied, 451 U.S. 911 (1981); *Klein v. American Luggage Works, Inc.*, 323 F.2d 787, 791 (3rd Cir. 1963). The existence of a conspiracy by its nature is not conducive to direct proof. Circumstantial evidence must often establish the requisite concert of action. See *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 142 (1948); *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946). Accordingly, we must assess the probative value of the circumstantial evidence offered by the plaintiffs to determine if there is a genuine issue of material fact regarding the existence of a conspiracy. If the inference from the circumstantial evidence to the ultimate fact of conspiracy is not permissible as a matter of law, it cannot raise an issue of material fact to defeat a properly supported motion for summary judgment. See *Zenith Radio Corp.*

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[90] See, e.g., Affidavit of Ralph Williams, Business Representative of the Council, Exhibit 1 at 12 and 13.

[91] See *Sunshine Books v. Temple University*, supra, 697 F.2d at 96 and discussion of Fed. R. Civ. P. 56(e), supra, at n. 16 and accompanying text.

v. Matsushita Elec. Indus. Co., supra, 513 F.Supp. at 1171. As stated in a similar context:

> When a trial court grants a directed verdict in a circumstantial evidence case, the court makes a legal determination that the narrative or historical matters in evidence allow no permissible inference of the ultimate fact urged by the opposing party. It decides that no reasonable person could reach the suggested conclusion on the basis of the hard evidence without resorting to guesswork or conjecture. To permit a jury to draw an inference of the ultimate fact under these circumstances is to substitute the experience of logical probability for what the courts described as "mere speculation." *Galloway v. United States*, 319 U.S. [372] at 395; *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d [20] at 25.

Sweeny, supra, 637 F.2d at 116.[92] Thus, to withstand the motion for summary judgment, plaintiffs' circumstantial evidence of conspiracy in this case must be such that a "reasonable person could reach the conclusion on the basis of the hard evidence without resorting to guesswork or conjecture." *Sweeny*, supra. We scrutinize the plaintiffs' circumstantial evidence accordingly.

2. *Evidence of Conspiracy in the Record*

Notwithstanding an extensive record, plaintiffs have failed to set forth specifically the circumstantial evidence believed probative of a conspiracy with non-labor entities. They rely essentially on the same evidence proffered

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[92] Although the discussion of the permissible inferences from evidence was made in the context of appeal from a directed verdict, it is equally applicable to a motion for summary judgment. See *Zenith Radio*, supra, 513 F.Supp. at 1171 (" 'Mere speculation', in the form of an inference which is not supported by logic, is not sufficient to withstand a motion for summary judgment.") (Footnote omitted).

in support of Count I as probative of a conspiracy with union employers—both general contractors and subcontractors—and others. We have endeavored to segregate the evidence apparently relied on by plaintiffs.

Initially, plaintiffs note that the avowed purpose of the Council is to organize the construction industry and obtain adequate wages and working conditions. But this purpose is made lawful by the labor laws [93] and itself cannot give rise to an inference of conspiracy with non-labor parties. The unions may achieve their goal by organizing non-union firms, pressuring non-union firms to meet area wages, or forcing them out of the market. Plaintiffs argue that the unions here chose to try to force non-union firms from the market [94] by picketing general contractors to obtain the subcontracting agreements restricting subcontracting to union firms. But there is no evidence in the record to suggest that the unions in seeking the subcontractor agreements tried to protect a select group of union contractors and deny non-union firms the option of becoming union or paying union scale wages. The evidence suggests the opposite; the unions' sole purpose was to organize as many contractors as possible to standardize wages and working conditions in the industry. The unions pursuit of subcontracting clauses to secure only union employment might benefit all union employers by stabilizing wages rates, but it is not probative evidence of a conspiracy with them as a matter of law

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[93] See *Leslie*, Principles of Labor Antitrust, 66 Va. L. Rev. 1183, 1183-88 (1980).

[94] The antitrust implications of this type of conduct are obvious. Where the unions seek to limit the number of firms in the product market by creating barriers to entry, a predatory purpose to erect and enforce a cartel of particular firms in the product market may be inferred. In this manner the employer cartel could regulate prices and outputs, while the union policed the arrangement to protect the dominent position of the cartel. See *Leslie*, supra n.93, 1190-92. This was the effect of the arrangement condemned in *Allen Bradley*.

under the prior precedent of the Court. See Bernhardt, The Allen Bradley Doctrine: An Accommodation of Conflicting Policies, 110 Pa. L. Rev. 1094, 1101-02 (1962).

In *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), the Court reaffirming *Allen Bradley* stated that, "[o]ne group of employers may not conspire to eliminate competition in the industry and the union is liable with the employers if it becomes a party to that conspiracy." Id. at 665-66. But a union may pursue a policy unilaterally and implement it even though such a policy affects some employers adversely and benefits others. Such union conduct "is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act." Id. at 665 n. 2. Cf., *Jou-Jou Designs*, supra, 643 F.2d at 910 (the implication that certain subcontractors would benefit from a hot cargo agreement is not an allegation that they conspired to achieve it); *Smitty Baker Coal*, supra, 620 F.2d at 434 (union seeking to compel all non-member coal operators to conform to union wage scale at behest of employer group does not show concert of action); *Iodice v. Calabrese*, supra, 512 F.2d at 390 (union secondary boycott which forced firms not to deal with non-union employer is insufficient evidence of conspiracy); *Webb v. Bladen*, 480 F.2d 306, 308 (4th Cir. 1971) (union secondary boycott which forced firms not to deal with non-union subcontractors was insufficient evidence of conspiracy.) A jury may not infer a union-employer conspiracy from a union's pursuit of a uniform wage and/or employment policy which indirectly benefits an employer group since the identify of interests is merely coincidental and not necessarily the product of a conspiracy. *Meat Cutters v. Jewel Tea Co.*, supra, 381 U.S. at 720 (Goldberg J., dissenting and concurring). To infer a conspiracy from this evidence would allow juries to become the arbiters of the social and economic desirability of union action in a particular case,

which is nothing more than mere speculation. We therefore find this evidence alone lacking in probative value.

The secondary pressure tactics employed by the Council [95] against various materialmen, financial institutions, and developers to force those business entities not to do business with Altemose or any other non-union contractor, do not support an inference of conspiracy with those entities. See *American Fed. of Musicians v. Carrol*, 391 U.S. 99, 105 n. 8 (restraint instituted by union conduct and acquiesced to by so-called employer group was not evidence of a conspiracy); *Allen-Bradley*, supra, 325 U.S. at 809 (union pressure alone resulting in individual refusals of all employers to buy electrical equipment not made by the union-labor is not a Sherman Act violation); *Hunt v. Crumboch*, supra, 325 U.S. at 822-23 (union refusal to negotiate with employer causing third party to cancel existing contract did not create a conspiracy). As the Court of Appeals recently stated, this theory "suggests that the victim who hands over his wallet to an armed robber thereby becomes a co-conspirator in the armed robbery. Absent extrinsic agreement, there is no concert of action with a non-labor party. . . ." *C & K Coal Co.*, supra, 704 F.2d at 699. It would be at best "mere speculation", as well as contradictory to the intent of labor's statutory exemption, if a jury were permitted to draw an inference of conspiracy from the favorable results of union secondary tactics. See *Mid-City Regional Bargaining Assn. v. Will County Carpenters*

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[95] There are no antitrust consequences from the fact that the union tactics included violence directed at Altemose and other subcontractors since the Sherman Act "draws no distinction between restraints effected by violence and those achieved by peaceful means," *Apex Hosiery*; supra, 310 U.S. at 513. To the extent that *Altemose Const. Co. v. Atlantic Cape May, Etc.*, 493 F.Supp. 1181, 1188 (D.N.J. 1980), differs with this conclusion, we note that its disregard of *Apex Hosiery* is at odds with its subsequent citation with approval by the Court in *Allen Bradley*, supra, 325 U.S. at 810. See also, *Schnabel v. Building & Const. Trades Council of Phila., Etc.*, supra, at 45.

District Council, 675 F.2d 881, 886-87 (7th Cir.), cert. denied, 103 S.Ct. 132 (1982).

There is evidence of a predominantly unionized construction market. The Council is shown to have executed over eight hundred fifty (850) contracts with general contractors. The unions have collective bargaining agreements with more than four thousand (4,000) subcontractors. This active union organizational effort has resulted in approximately 90% of the construction market being unionized. The Council distributes a list of so-called "fair," i.e., union subcontractors, to general contractors with whom it executes a subcontracting agreement. This list is provided so that the general contractors will know who the union subcontractors are. There is no evidence that union-employers prompted or encouraged the distribution of the "fair" list.

The inference from these facts supports the conclusion that the unions' unilateral organizational activities were very successful. Even if this circumstantial evidence can be said to give rise to an inference of some union-employer scheme, it simply does not rise to the level of "significant probative evidence" which is required to demonstrate that a genuine issue of fact exists as to the conspiracy charged in Count I.

Although we are cognizant of a party's right to have a jury resolve disputed facts, " 'a party resisting a motion [for summary judgment] cannot expect to rely merely upon bare assertions, conclusory allegations or suspicions'." *O'Brien v. Eli Lilly Co.*, 668 F.2d 704, 712 (3rd Cir. 1981) (quoting *Ness v. Marshall*, 660 F.2d 517, 519 (3rd Cir. 1981)). That is the cumulative nature of the extensive evidence in this case. We conclude, therefore, that in absence of any proof of knowledge or intentional participation in an illegal combination or common scheme of the union with non-labor entities, summary judgment must be granted with respect to Count I.

IV. CONCLUSION

We hold that the evidence in support of Count I is insufficient as a matter of law to provide an inference of conspiracy to violate Sections 1 or 2 of the Sherman Act. We also hold that based on the evidence of record in support of Count II, any concerted action is solely among the union defendants, such union activity is protected by a statutory exemption to the antitrust laws. Alternatively, we find that the subcontracting agreements at issue have sufficient indicia of organizational intent to establish they were negotiated and enforced in a collective bargaining context and, not being in violation of 29 U.S.C. § 158(e), enjoy non-statutory exemption from the antitrust laws. For these reasons, defendants' cross-motion for summary judgment must be granted

EXHIBIT I.

AGREEMENT

THIS AGREEMENT made and entered into this ———— day of ———— 19—, by and between ———— hereinafter called the Employer which term shall also include a contractor who may not necessarily be a direct employer of employees in the crafts); and the Philadelphia, Pennsylvania Building and Construction Trades Council, affiliated with the AFL-CIO, hereinafter called the Union.

WITNESSETH:

In consideration of the mutual promises hereinafter named, the parties hereto agree as follows:

RECOGNITION OF COUNCIL.

1. The Employer agrees to recognize the Philadelphia Pennsylvania Building and Construction Trades Council as the spokesman of the workers in the industry and the representative of the respective trades taken collectively. This is not deemed to imply direct recognition in the sense of its meaning under Section 8(b) of the Labor Management Relations Act of 1947, as amended, in that the Council does not have as its members any individual workers, but in fact is made up of affiliated local unions who are the direct collective bargaining representatives of their respective trades.

SUBCONTRACTING OBLIGATIONS.

1. The Employer agrees to provide in the specifications on doing any business with subcontractors for work on the building or construction job site that such subcontractors as a condition precedent to their commencing work on the job site will enter into collective bargaining

agreements with the appropriate craft union member of the Council which is the recognized collective bargaining agent of the particular trade. In no event, will the Employer subcontract any work to any subcontractor who is not in such contractual relations or who does not achieve such contractual relations prior to commencing work.

2. A list of all subcontractors will be posted on the site of the job.

DIRECT OBLIGATIONS.

The following obligations of the Employer will apply when contract has been entered into between the Employer and the Council. If, however, it has been deemed necessary by the Council to picket or take other appropriate economic action against the Employer prior to achieving contractual relations, in which event such picketing or other economic action shall be deemed to be taken for the purposes of achieving this collective bargaining agreement) only to obtain accord to the portion of this contract referred to as "Subcontracting Obligation."

1. The Employer, with reference to work required by him in the industry, agrees to enter into collective bargaining agreements with only member Unions of the Council which are recognized collective bargaining agents for the particular trade or craft required for the job.

2. The employment as above referred to include skilled, semi-skilled and unskilled labor on all work now and hereafter being done directly and indirectly by the Employer.

3. The Employer agrees to abide by all the rules and regulations of the respective trades affiliated with the Building and Construction Trades Council, and to comply with the rates and the specified hours as recognized by the respective trades. In the event that the employer should engage subcontractors to perform such work, then the employer agrees that such subcontractors will observe

hours, wages, fringe benefits and working conditions as recognized by the different trades.

RESPONSIBILITIES FOR THE JOB.

It is recognized that the Employer, because of the complexities of the industry in certain types of job site building and construction, carries a responsibility for insuring that the total job and that all work which takes place on the job be in accord with the obligations contained in this agreement. Recognizing this responsibility and recognizing the problems that arise when an owner of the property limits the scope of the Employer's work and contracts work out directly by passing the Employer, when a destruction of standards occurs carrying with it a bypassing of the intent and obligations under this agreement, it is further agreed as follows:

1. The Employer in entering into his contract with the owner assumes for purposes of his obligations with the Council the complete responsibility for all work on the site being performed under the conditions set forth in this agreement whether or not there are in fact subcontractors who are not engaged by the Employer.

2. In order to meet the obligations contained in Paragraph 1. the Employer agrees that he will in his contract with the owner of the property or the contracting party for the building and construction work, require that all building and construction work at the job site where performed directly by the owner or whether performed by tenants who utilize facilities of the site be performed in accord with the obligations in this agreement.

LEGALITY AND SEPARABILITY.

1. It is the intention of the parties to this agreement to conform in all ways to the requirements of the law and to have entered into an agreement permitted by the Labor Management Relations Act of 1947 as amended.

In the event any portion of this agreement is declared illegal, it shall have no effect on the balance of the agreement.

ENFORCEMENT.

1. It is agreed by and between the Employer and the Council that both will exert every honorable means towards the execution of this agreement, and will cooperate in every possible way towards furthering the interests of both parties hereto.

2. All complaints shall be settled in accord with the following procedure:

A. All disputes, grievances or complaints involving the interpretation or application of this Agreement which cannot be resolved by the parties within twenty-four (24) hours after either party has raised the issue concerning the dispute, grievance or complaint, then either party may request in writing the American Arbitration Association to designate an arbitrator within twenty-four (24) hours to heat the issues so raised, and said arbitrator shall set a hearing and dispose of the said issues within forty-eight (48) hours thereafter.

B. The decision of the arbitrator shall be final and binding upon the parties. The cost of the arbitration shall be borne equally by the parties.

C. The arbitrator is specifically authorized to levy sanctions, deterent money awards and affirmative orders in the event the Employer violates any provisions of this agreement, which provisions are not remedied or cannot be lawfully remedied by the use of legal strike, picketing and other economic action by the Council. In rendering such affirmative orders, the arbitrator shall be authorized to liquidate damages in areas in which specific monetary damages cannot be ascertained or made certain.

D. Nothing contained herein shall be construed to require arbitrator of a strike or work stoppage which may

occur at the natural expiration of the current term of this agreement, unless this agreement is automatically renewed or the term extended with modifications as herein provided.

DISTRICT.

This agreement is to cover the following Pennsylvania Counties in their entirety: Philadelphia, Delaware, Montgomery, Bucks and Chester.

SCOPE OF OBLIGATION.

All of the aforegoing provisions shall be binding not only upon the company, firm and individual who is signatory to this agreement, but shall also be binding upon any other operations, regardless of whether or not they are under separate company or corporate names in which the firm signatory to this contract has a substantial interest. It is the intent of the parties to this agreement to bind not only the firm in question, but also to make such contract coverage applicable to any operations to which the signatory is related by virtue of common direction or ownership in whole or in part in any five county jurisdiction.

DURATION OF AGREEMENT.

1. This agreement shall go into effect on the ——— day of ————, 19—, and shall continue from year to year thereafter unless either party gives written notice to the other, ninety days prior to any annual termination date, of the desire to change any of the terms of this agreement.

EXHIBIT II.

THIS AGREEMENT made and entered into this ——— day of ————, 19—, by and between hereinafter called the Employer, and the Philadelphia, Pennsylvania Building and Construction Trades Council, affiliated with the AFL-CIO, hereinafter called the Union.

WITNESSETH:

In consideration of the mutual promises hereinafter named, the parties hereto agree as follows:

RECOGNITION OF COUNCIL.

1. The employer agrees to recognize the Building and Construction Trades Council of Philadelphia and Vicinity as the spokesman of the workers in the industry and the representative of the respective trades taken collectively.

EMPLOYMENT.

1. The Employer, with reference to work required by him in the industry, agrees to enter into collective bargaining agreements with only member Unions of the Council which are recognized collective bargaining agents for the particular trade or craft required for the job. All such agreements shall contain the Union Security Clause permitted by Sec. 8(f)(2) of the Labor Management Relations Act of 1947 as amended.

2. The Employer further agrees to provide in their specifications when doing any business with sub-contractors for work on the job site, that such sub-contractors, as a condition precedent to their commencing work on the job site, will enter into collective bargaining agreements only with a member Union of the Council who is the recognized Collective Bargaining Agent of the particular trade. All such agreements shall contain the

Union Security Clause permitted by Sec. 8 (f) (2) of the Labor Management Relations Act of 1947 as amended.

3. The employment as above referred to includes skilled, semi-skilled and unskilled labor on all work now and hereafter being done directly and indirectly by the Employer.

4. The employer agrees to abide by all the rules and regulations of the respective trades affiliated with the Building and Construction Trades Council, and to comply with the rates of wages and the specified hours as recognized by the respective trades. In the event that the employer should engage sub-contractors to perform such work, then the employer agrees that such sub-contractors will observe hours, wages, fringe benefits and working conditions as recognized by the different trades.

5. It is also agreed by the parties hereto that a list of all sub-contractors will be posted on the site of the job.

6. It is agreed by and between the employer and the Council that both will exert every honorable means toward the execution of this agreement, and will cooperate in every possible way towards furthering the interests of both parties hereto.

7. (a) All disputes, grievances, or complaints involving the interpretation or application of this Agreement which cannot be resolved by the parties within twenty-four (24) hours after either party has raised the issue concerning the dispute, grievance or complaint, then either party may request in writing the American Arbitration Association to designate an Arbitrator within twenty-four (24) hours to hear the issues so raised, and said Arbitrator shall set a hearing and dispose of the said issues within forty-eight (48) hours thereafter.

(b) The decision of the Arbitrator shall be final and binding upon the parties. The cost of the Arbitration shall be borne equally by the parties.

(c) Nothing contained herein shall be construed to require arbitration of a strike or work stoppage which may occur at the natural expiration of the current term of this Agreement, unless this Agreement is automatically renewed or the term extended with modifications as herein provided.

DISTRICT.

This Agreement is to cover the following Penna. Counties in their entirety:

PHILADELPHIA, DELAWARE, MONTGOMERY, BUCKS and CHESTER.

DURATION OF AGREEMENT.

1. This Agreement shall go into effect on the day of , 19 , and shall remain in full force and effect until the day of , 19 , and shall continue from year to year thereafter unless either party gives written notice to the other, ninety days prior to any annual termination date, of the desire to change any of the terms of this Agreement.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written.

FOR THE FIRM:

WITNESS: _____ (SEAL)

_____ _____ (SEAL)

_____ _____ (SEAL)

Employer's Social Security No. _____

Philadelphia, Pennsylvania Building and Construction Trades Council, AFL-CIO

Employer's Unemployment Compensation No. _____

_____ (SEAL)

_____ (SEAL)

_____ (SEAL)

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 83-1581 and 83-1582

ALTEMOSE CONSTRUCTION COMPANY, ASSOCIATED BUILDERS AND CONTRACTORS, INC., THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

v.

BUILDING & CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY, *et al.*

Altemose Construction Company
Appellant in No. 83-1581

The Chamber of Commerce of the
United States of America
Appellant in No. 83-1582

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, SLOVITER and BECKER, *Circuit Judges*, and TEITELBAUM, *District Judge**

---

* Hon. Hubert I. Teitelbaum, Chief Judge of the United States District Court for the Western District of Pennsylvania, sitting by designation.

The petition for rehearing filed by appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who occurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ John J. Gibbons
Judge

Dated: February 15, 1985

APPENDIX D

STATUTES AND RULE INVOLVED

Sherman Act

Section 1 of the Sherman Antitrust Act, 26 Stat. 209, 15 U.S.C. § 1, provides in pertinent part as follows:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 2 of the Sherman Antitrust Act, 26 Stat. 209, 15 U.S.C. § 2, provides in pertinent part as follows:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Clayton Act

Section 6 of the Clayton Antitrust Act, 38 Stat. 731, 15 U.S.C. § 17, provides as follows:

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having

capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Section 20 of the Clayton Antitrust Act, 38 State 731, 29 U.S.C. § 52, provides as follows:

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employeees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for

lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

Norris-LaGuardia Act

Section 4 of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 104, provides as follows:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

Section 6 of the Norris-LaGuardia Act, 47 Stat. 71, 29 U.S.C. § 106, provides as follows:

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual partcipation, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

Section 13 of the Norris-LaGuardia Act, 47 Stat. 73, 29 U.S.C. § 113, provides as follows:

When used in this Act, and for the purposes of this Act—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of

employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

Federal Rules of Civil Procedure

Rule 56 of the Federal Rules of Civil Procedure provides in pertinent part as follows:

* * * *

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the

hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * * *

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denial of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

* * * *

Supreme Court, U.S.
FILED
AUG 13 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-82

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

BUILDING & CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY, *et al.*,
Petitioners,

v.

ALTEMOSE CONSTRUCTION COMPANY AND CHAMBER OF COMMERCE OF THE UNITED STATES,
Respondents.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Third Circuit

BRIEF IN OPPOSITION OF RESPONDENT, ALTEMOSE CONSTRUCTION COMPANY.

Howard A. Rosenthal
Pelino & Lentz, P.C.

John W. Pelino
David A. Gradwohl
2300 Packard Building
Philadelphia, PA 19102
(215) 665-1540

(Counsel of Record)

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

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QUESTIONS PRESENTED.

1. May the Court of Appeals reinstate an antitrust claim dismissed by the district court for lack of proof of a conspiracy where, after conducting a plenary review of the summary judgment record, the Court of Appeals finds sufficient evidence of a concert of action among petitioners and non-union entities, as well as circumstantial evidence of conduct which is "*prima facie*" contrary to the economic self-interest of the co-conspirators?

2. Does the doctrine of collateral estoppel preclude proof in an antitrust conspiracy case that the activities of labor unions in furtherance of the conspiracy beginning in 1971 had no organizational or recognitional intent where the National Labor Relations Board found an organizational purpose for the labor unions' picketing only during the first four months of 1975?

3. In light of this Court's decision in *Connell Construction Co. Inc. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975), does the statutory exemption to the antitrust laws in Sections 6 and 20 of the Clayton Act, 15 U.S.C. §§17 and 29 U.S.C. §52, preclude an antitrust claim against combinations of labor unions in the construction industry which, in seeking a subcontractors' agreement from a general contractor with which they have no collective bargaining relationship, do not act in their own self-interest but rather on behalf of a favored group of unionized contractors/employers?

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS FOR THE THIRD CIRCUIT

In addition to the parties listed on pages ii and iii of the Petition, the Associated Builders and Contractors, Inc. is a co-plaintiff in the district court which withdrew its appeal prior to the decision of the Court of Appeals for the Third Circuit.

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No. 85-82

IN THE
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OCTOBER TERM, 1985

BUILDING & CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY *et al.*,
Petitioners,

v.

ALTEMOSE CONSTRUCTION COMPANY AND CHAMBER OF COMMERCE OF THE UNITED STATES,
Respondents.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Third Circuit

BRIEF IN OPPOSITION OF RESPONDENT, ALTEMOSE CONSTRUCTION COMPANY.

Respondent, Altemose Construction Co. ("Altemose"),[1] respectfully requests that this Court deny the

1. Altemose Construction Co. is a Pennsylvania corporation, which is wholly owned by Altemose Enterprises, Ltd., a closely held Pennsylvania coporation.

petition for writ of certiorari, seeking review of the Third Circuit's opinion in this case reported at 751 F.2d 653.

JURISDICTION

Except that the decision of the Court of Appeals was rendered on January 8, 1985, petitioners' jurisdictional statement is not disputed.

STATUTES AND RULES INVOLVED.

In addition to the references made on p. 2 of the Petition, this case also involves a request for declaratory relief pursuant to 28 U.S.C. §§ 2201-02 (1982), treble damages pursuant to 15 U.S.C. § 15 (1982), and injunctive relief pursuant to 15 U.S.C. § 26. These provisions are reproduced in the Supplemental Appendix following this Brief.

STATEMENT OF THE CASE.[2]

Altemose is a non-union, general contractor engaged primarily in the construction of commercial properties in the Philadelphia area.[3] Altemose regularly employs approximately 150 employees who perform various construction trades (*i.e.*, carpenters, painters, laborers, etc.) and who do not belong to any union. Prior to 1971,

2. This Petition is the second attempt by these petitioners to seek review by this Court of Altemose's antitrust claims prior to a trial on the merits. In 1974, the Third Circuit refused to grant Petitions for Writ of Prohibition and Mandamus asking for a reversal of the district court's decision denying petitioner's motions to dismiss the Complaint. *Building & Construction Trades Council of Philadelphia and Vicinity, et al. v. A. Leon Higginbotham, Jr., Judge*, Nos. 74-1756 and 74-1772. Petitions for a Writ of Certiorari (Nos. 74-412 and 74-557) were denied by this Court on January 27, 1975. 420 U.S. 908 (1975).

3. As accepted in the Third Circuit and district court, the relevant product market is construction services, and the relevant geographic market includes the Pennsylvania counties of Philadelphia, Delaware, Bucks, Montgomery and Chester.

Altemose subcontracted much of the work on its construction projects to independent subcontractors, over half of which had employees represented by various construction trades unions, which were members of the Building and Construction Trades Council of Philadelphia and Vicinity, AFL-CIO ("Council").

Beginning in 1971, the Council sought from Altemose a "standard sub-contractors agreement" requiring Altemose to employ only union labor on its construction projects and to subcontract work only to subcontractors who employ union labor. (App. 6a-7a.) The Council had obtained similar agreements from over 400 general and subcontractors in the Philadelphia area. (App. 4a.) The Council and its member unions expressly disclaimed any interest in organizing Altemose's employees and stated that they would not accept Altemose's employees as union members, thereby requiring Altemose to discharge its 150 employees and replace them with union members in the employ of union contractors. (R. 506, 531-32, 633-34, 652-58, 659-661, 665.)[4]

The General Building Contractors Association ("GBCA") is an association of building contractors who have collective bargaining agreements with trade unions which are members of the Council. (App. 4a.) Both by agreement and as a result of years of practice, individual members of the GBCA do not enter into agreements with non-union subcontractors. If any member strayed from that policy, the GBCA, at the urging of the Council, would contact the errant contractor, which cured the situation by removing the non-union contractor from the construction job. Moreover, the Council authorized the picketing of any GBCA member who employed a non-union contractor. The Council also published a list of all unionized contractors and subcontractors (so-called

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4. References to "R" are to the extensive Appendix (4,373 pages) reviewed by the Court of Appeals.

"fair" contractors). The cumulative impact of the conduct of the Council, its member unions, and GBCA was that over 90% of the construction work in the Philadelphia area was performed by contractors listed in the Council's directory.

To induce Altemose to sign the subcontractor's agreement, the Council offered to supply Altemose with unionized subcontractors who would work at the lower, non-union contract price, even where those same subcontractors previously submitted higher bids. (R. 614, 1078, 1096-1109, 1113-1121.) Altemose refused to sign the Council's standard sub-contractors agreement. The Council then initiated a campaign of direct intimidation and secondary pressure, including threats of violence and actual violence such as the destruction of an Altemose construction jobsite by a "virtual military assault" on June 5, 1972, described by the Third Circuit in its discussion of the summary judgment record. (App. 6a-10a.) These actions were taken in the complete absence of any legitimate labor dispute between the Council and Altemose and of any collective bargaining relationship between Altemose and the Council or its member unions. The net effect of these circumstances was, and continues to be, to exclude Altemose and other non-union contractors from competing with union contractors for commercial construction projects in Philadelphia area.

In order to prevent the Council from unlawfully precluding access to that market, without sacrificing long-standing employees and the ability to obtain subcontractors and suppliers at the lowest competitive price, Altemose in 1973 filed its complaint alleging in Count I an antitrust conspiracy among the Council, its members and members of the GBCA, and in Count II an antitrust conspiracy only among the Council and its members, to restrain trade and monopolize the market for construction services in the Philadelphia area in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C.

1 and 2, and seeking declaratory and injunctive relief, as well as treble damages. As found by the Third Circuit, the foregoing is supported by the summary judgment record and there are genuine issues of material fact relating to the existence of the antitrust conspiracy and the application of the non-statutory labor exception to the antitrust laws to warrant a trial on the merits of Altemose's claims.

REASONS WHY THE WRIT SHOULD BE DENIED.

I. THE THIRD CIRCUIT'S DECISION AS TO COUNT I, FOLLOWING PLENARY REVIEW OF THE COMPLEX SUMMARY JUDGMENT RECORD IS CONSISTENT WITH THE STANDARDS PROMULGATED BY THIS COURT, ON COUNT I TURNS ON THE UNIQUE FACTS PRESENTED BY THIS CASE.

Petitioners suggest that the standard used by the Third Circuit to evaluate the summary judgment record on Count I should be reviewed because this Court has recently granted certiorari on a question of the sufficiency of evidence of an antitrust conspiracy in a "parallel acts" case, *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238 (3d Cir. 1983). *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., cert. granted*, 53 U.S.L.W. 3702 (U.S. April 1, 1985) (No. 83-2004). But the factual predicate for the legal question to be decided in *Matsushita* is simply lacking in this case, and the petitioners' invitation for this Court to canvass the lengthy summary judgment record is not important enough to merit this Court's discretionary jurisdiction.

The only reference to *Japanese Electronic Products* in the Third Circuit's opinion was in support of a general statement of the standard to be followed in reviewing the summary judgment record:

> "This Court recently outlined the legal standard governing sufficiency of evidence of conspiracy. We noted that the court must examine all admissible evidence, direct and circumstantial, in order to determine whether a trier of fact could reasonably infer concert of action." (App. 5a.)

There is no error in this statement for it follows the oft-repeated, long-standing observations by this Court that permissible inferences of an antitrust conspiracy arise from the totality of the circumstances without compartmentalizing or fragmentizing the factual matrix and viewing each component in isolation. *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690, 698-99 (1962); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 223 (1939).

The Third Circuit, applying these well-established principles, held that the district court erred in failing to analyze as a whole the factual record for evidence and permissible inferences of an antitrust conspiracy among the Council, its member unions and non-labor entities (e.g. contractors, users of construction services, suppliers, insurance companies providing construction bonds, etc.), and to include in the overall conspiracy equation the significant probative evidence favorable to the existence of such a conspiracy. Of the sixty-five (65) pages of its "Memorandum of Decision," the district court only used eight pages to evaluate the record and dispose of the Count I claim. (App. 66a-72a.) Most of those pages discuss cases and largely ignore extensive record of more than 4,373 pages. Although the district court paid lip service to Altemose's factual statement, it gave short shrift to the record in reaching the conclusion that the facts did not support a conspiracy. Contrary to petitioners' STATEMENT OF THE CASE, Petition at 2-7, the Third Circuit did not agree with the district court's analysis of the summary judgment record.

The Third Circuit canvassed the extensive summary judgment record for inferences of an antitrust conspiracy logically supported by the record, and concluded that the quantum of evidence was sufficient to overcome a motion for summary judgment. This Court has repeatedly ruled that the review of such fact canvassing is not the purpose of certiorari. *United States v. Johnston*, 268 U.S. 220, 227 (1925). Petitioners here seek to have this Court repeat the Third Circuit's painstaking review of a large summary judgment record and reach a different conclusion. For that reason alone, the petition should be denied.

The factual matrix of this case is distinctly dissimilar to those cases that petitioners contend the Third Circuit failed to follow. Each case attempting to establish an antitrust conspiracy from circumstantial evidence turns on the inferences logically supported by its peculiar facts. In *First National Bank of Arizona v. Cities Services Co.*, 391 U.S. 253, 287-288 (1968), this Court concluded only that a parallel refusal to deal without more was insufficient to establish a conspiracy and overcome a properly supported Rule 56 motion. In the *Matsushita* case, a horizontal price fixing conspiracy in United States was alleged on the basis of circumstantial evidence of parallel business behavior in the United States and an actual price fixing agreement in Japan.

The type of conspiracy and facts offered by Altemose to prove the conspiracy among unions and non-union entities are totally dissimilar to those cases. As recognized by the Third Circuit, the record supports the inference that much more than innocent parallel behavior by contractors and unions is involved. Although petitioners try to belittle that evidence, they cannot blunt the simple fact that the evidence demonstrates activities consistent with a concert of action to obtain a result forbidden by the antitrust laws and wholly inconsistent with lawful independent activity. The prime example of such evidence is the Council's offer to Altemose to provide union

sub-contractors to work on Altemose's construction projects at lower, non-union contract prices if Altemose would sign a subcontractors' agreement despite prior, higher bids. (R. 502-503, 506-507, 531-532, 614, 659, 686-88, 1078, 1096-1109, 1113-1121.) Petitioners have either erroneously or intentionally choose to misstate the Third Circuit's opinion on this point by referring to its summary of the evidence (App. 10a). Petition at 22. However, it is quite clear that the Third Circuit recognized the real significance of the Council's offer to obtain lower priced unionized subcontractors. (App. 9a). This evidence is highly probative that the Council and the unionized contractors had unlawfully conspired and reinforces the other circumstantial evidence of direct and secondary pressure which petitioners choose to characterize as innocent, independent conduct brought to bear on Altemose by the Council.[5] Thus, the factual basis for the question under review in *Matsushita* is absent.

This evidence also satisfies the standard recently announced by this Court in *Monsanto Co. v. Spray-Rite Service Corp.*, U.S. , 104 S.Ct. 1464 (1984), even if that standard applies to this case. *Monsanto,* unlike this case, involved a vertical price fixing conspiracy arising from the termination of a dealer following price complaints by another dealer to the manufacturer. This Court held that a finding of an antitrust conspiracy could not be based solely on the complaints of other dealers and the termination. Rather, "there must be evidence [direct or circumstantial] that tends to exclude the possibility of independent action by the manufacturer and distributor." 104 S.Ct. at 1473. Even under that "heightened" standard, the conspiracy in *Monsanto* was proved to the satisfaction of this Court on facts substantially less convincing of independent conduct than those recited by the

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5. The Council and unions' lack of unilateral, self-interest is illustrated by their total lack of interest in organizing Altemose's employees.

Third Circuit in this case. If *Monsanto* has any impact on this case, its standard is satisfied by Altemose's evidence. *Monsanto* relied upon the Third Circuit's opinion in *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981), which held that evidence of parallel business conduct was insufficient without more to prove an antitrust conspiracy. Clearly, the Third Circuit in this case concluded that the circumstantial evidence presented by Altemose involved much more than bare "conscious parallelism" by the Council, unions and non-labor entities. Such evidence, accompanied by actions contrary to the pecuniary interests of the unions, union contractors and other non-labor groups, as well as proof of motivation to enter, and actual entry into an agreement, is sufficient to infer a conspiracy under *Sweeney*. 637 F.2d at 114.

Neither *Monsanto* nor any other decision of this Court requires Altemose on a motion for summary judgment to establish conclusively that the co-conspirators were not acting independently. *First National Bank of Arizona v. Cities Services Co.*, 391 U.S. at 288-89. All that is necessary, even if *Monsanto* is applicable, is evidence tending to show the absence of independent action.[6] Thus, petitioners' explanation of their activities in terms of independent, self-motivated conduct, does not warrant summary judgment. Whether one logical inference from a given set of facts is more plausible than another should not to be decided on summary judgment but by the ultimate trier of fact. While not referring to the *Monsanto* standard directly, the Third Circuit found logical inferences from significantly probative evidence tending to exclude the possibility of independent action by the petitioners and their co-conspirators and tending

6. Certiorari to construct the applicable limits of *Monsanto* may be inappropriate at this time since Congress has recently introduced legislation (S. 1445, 99th Congress, 1st Sess.) to overturn the holding of *Monsanto*. (*See* remarks of Senator Howard M. Metzenbaum (Ohio) in 131 Cong. Rec. S9579 (daily ed., July 16, 1985).

to establish a conscious commitment to a common scheme to violate the antitrust laws. Petitioners' suggestion of other logical inferences which may support independent action, does not support summary judgment but rather a trial on the merits. Since Altemose has raised genuine issues of fact about the existence of a common scheme, certiorari is unnecessary, and the case does not merit review by this Court.

II. THE THIRD CIRCUIT'S RULING AS TO THE COLLATERAL ESTOPPEL EFFECT OF THE DECISION OF THE NATIONAL LABOR RELATIONS BOARD IS LEGALLY AND FACTUALLY INSIGNIFICANT, DOES NOT CONFLICT WITH OTHER CIRCUITS, AND OTHERWISE IS NOT AN IMPORTANT QUESTION TO JUSTIFY THE GRANT OF CERTIORARI.

Whether or not the doctrine of collateral estoppel precludes Altemose from proving the petitioner's lack of organization and recognitional objections in picketing during the *first four months* of *1975* is so unimportant in the context of the antitrust conspiracy presented by this case that review by this Court is not justified.

Altemose has presented evidence of an antitrust conspiracy that began in 1971. From that beginning in 1971, the Council eschewed any desire to organize Altemose's 150 permanent employees. In fact, it was made clear to Altemose that if it signed the subcontractors' agreement, those employees would have to be discharged. Relying on the decision of the National Labor Relations Board ("NLRB") that picketing by certain of the petitioners in the period January-April, 1975 had an organizational or recognitional purpose, *Building and Construction Trades Council of Philadelphia and Vicinity, AFL-CIO*, 222 NLRB 1276 (1976), *aff'd mem. sub nom., Altemose Construction Co. v. NLRB*, No. 76-1336,

93 LRRM 3085 (3d Cir. 1976),[7] the district court erroneously held that Altemose could not deny the organizational intent of the Council's conduct beginning in 1971. That conclusion contradicts the district court's admission that the petitioners denied any organizational objective in 1971. (App. 59a, n. 80.). The district court also ignored the NLRB's finding that after May, 1975, the Council's picketing and other activities had no organizational or recognitional objective. 222 NLRB at 1282.

Even if collateral estoppel precludes further proceedings on the limited issues decided by the NLRB, Altemose may still prove the lack of any organizational intent from 1971 to 1975 and after May, 1975. The preclusion sought by petitioners is simply inconsequential to Altemose's claim under Count II, and, as such, lacks sufficient importance to be reviewed by this Court.[8]

Moreover, the purported conflict between the circuits constructed by the petitioners does not exist. In *International Wire v. Local 38, International Brotherhood of Electrical Workers*, 475 F.2d 1078 (6th Cir.), *cert. denied*, 414 U.S. 867 (1973), the Sixth Circuit reasoned that the doctrine of res judicata barred relitigation of an unfair labor practice charge in a case brought under 29 U.S.C. § 187, when the charging party failed to contend

7. As stated in the decision of the Administrative Law Judge adopted by the NLRB, the issue was

> "Whether [the Council] picketing of Altemose's construction sites from January 20 to April 23, 1975, with an object of obtaining a subcontractor agreement was violative of Section 8(b)(7)(C) of the Act." 222 NLRB at 1276.

See also Hirsch v. Building and Construction Trades Council of Philadelphia and Vicinity, 530 F.2d 298 (3d Cir. 1976), where the Court affirmed an injunction against allegedly recognitional picketing against Altemose in January, 1975 for more than thirty days.

8. The Council changed its stated objective due to the realization, confirmed by this Court's decision in *Connell Construction Co., Inc. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975), that its activities against Altemose in the absence of any "collective bargaining relationship" violated the antitrust laws.

that he had been denied a full and fair hearing before the NLRB. That case was declared to be "sound" by the Third Circuit in *Consolidated Express, Inc. v. New York Shipping Association*, 602 F.2d 494, 503 (3d Cir. 1979), *vacated and remanded on other grounds*, 448 U.S. 902 (1980). In *International Ass'n of Machinists & Aerospace Workers v. Nix*, 512 F.2d 125 (5th Cir. 1975), the Fifth Circuit applied collateral estoppel to bar relitigation of the charging party's admission of theft of his employer's confidential documents made during the NLRB proceeding.

Placed in their proper factual perspectives, neither case conflicts with the Third Circuit decision in this case. Altemose, as a charging party, had no control over the factual and legal issues tried before the Administrative Law Judge ("ALJ") and reviewed by the NLRB because, under 29 U.S.C. § 160, the General Counsel controlled the litigation. (App. 18a.) That control is illustrated by the *NLRB Case Handling Manual (Part One), Unfair Labor Practice Proceedings* at ¶ 10380.3, which instructs the trial attorney to control the prosecution of the case and to oppose, informally and formally, any efforts of the charging party which jeopardize that prosecution.[9] (Supp. App. 4a.) The limited role of the charging party in NLRB proceedings did not give Altemose "an adequate opportunity to litigate" which is the cornerstone of giving collateral estoppel effect to decisions of administrative agencies. *United States v. Utah Construction and Mining Co.*, 384 U.S. 394, 422 (1966).

The Third Circuit's decision in this case denied the application of collateral estoppel based on due process constraints since Altemose did not control its destiny in the NLRB proceedings. *Parklane Hosiery Co., Inc. v.*

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9. In this administrative proceeding, the positions of the General Counsel and Altemose were not the same, and General Counsel sought permission to contest Altemose's brief in support of its exceptions to the ruling of the ALJ. 222 NLRB at 1276, n. 1.

Shore, 439 U.S. 322, 331 (1979) (if procedural opportunities are unavailable in an administrative agency proceeding, collateral estoppel does not apply). In the absence of control over the NLRB case, Altemose cannot be precluded from proving the lack of organizational intent, even for the four months during 1975 at issue in that proceeding.

III. THE THIRD CIRCUIT'S REINSTATEMENT OF COUNT II IS BASED SOLELY ON THE FACTUAL MATRIX OF THAT CLAIM AND IS CONSISTENT WITH THIS COURT'S DECISION IN CONNELL.

Believing that the statutory antitrust exemption for labor organizations precludes trial on Count II,[10] the petitioners ask the Court to review a broad, general question which is really not presented by the unique pleading of Count II. The Third Circuit did not decide that question, and the factual predicate for the petitioners' argument is missing from the case. More important, to reach the question raised by petitioners would require the resolution of sharply disputed facts.

Count II alleges a combination of the Council and unions not acting in their self-interest but, instead, on behalf a favored group of employers with which they have collective bargaining agreements to create an exclusive enclave for union contractors in the geographic market. The major difference between Count I and II, as recognized by the Third Circuit, is the lack of participation by non-union entities in a conspiracy having secondary effects. (App. 11a.) That distinction, which turns on the unique pleading in this case, demonstrates that petitioners' question does not require this Court's attention.

Contrary to what petitioners suggest, the elimination of the non-union entities from the conspiracy among

10. The statutory sources of that exemption are identified in the Third Circuit's opinion. (App. 11a)

unions to engage in secondary activities does not invoke the protection of the statutory exemption. When unions do not act in their legitimate self-interest, they are subject to the restraints of the antitrust laws. *See United Mine Workers v. Pennington*, 381 U.S. 657, 662 (1965); *United States v. Hutcheson*, 312 U.S. 219, 232 (1941).

In *Allied International, Inc. v. International Longshoremen's Ass'n*, 640 F.2d 1368, 1379-80 (1st Cir. 1981), *aff'd*, 456 U.S. 212 (1982), the First Circuit, interpreting *Hutcheson* and *Pennington*, held that the statutory exemption only applies if a "two-prong" test is satisifed: (1) the union did not conspire with a non-labor group and (2) the purpose of the union's conduct was related to legitimate union goals. A specific anticompetitive object, like excluding Altemose and other non-union contractors from the relevant market, is not a legitimate union interest enjoying protection from the antitrust laws. *Sacramento Coca-Cola Bottling Co., Inc. v. Chauffeurs, Teamsters and Helpers Local No. 150*, 440 F.2d 1096 (9th Cir.), *cert. denied*, 404 U.S. 826 (1971). *See Local Union No. 189, Amalgamated Meat Cutters, and Butcher Workmen of North America v. Jewel Tea Co., Inc.*, 381 U.S. 676, 692-93 (1965) (union's efforts to protect one group of employers from competition is not exempt from the Sherman Act.)

The question raised for review by petitioners simply does not relate to the substance of Count II or its supporting facts and does not merit the review of this Court when considered in context.

In virtually every respect, Count II raises the same factual and legal issues resolved by this Court ten years ago in *Connell*. As noted by the Third Circuit, the same subcontractors' agreement which the Council sought to impose on Altemose, while disclaiming any interest in its employees, was considered in *Connell*. The Counsel's actions against Altemose occurred at the same time that the union in *Connell* picketed the contractor to force the

execution of the subcontractor's agreement. The only divergence of the facts supporting Count II and those in *Connell* is that Altemose (unlike the contractor in *Connell*) refused to sign the subcontractors' agreement, which the district court for some reason found sufficient to dismiss Count II. As the Third Circuit properly concluded, the refusal to sign an unlawful agreement does not deprive Altemose of the protection of the antitrust law or clothe the unions' activities to make Altemose sign with the shield of the statutory exemption. (App. 13a.) Following *Connell*, the Third Circuit found that union collusion with other contractors in the execution of subcontractors' agreement, although not part of the antitrust conspiracy alleged in Count II, was sufficient to take away the protection of the statutory exemption from the Council's unilateral unlawful activities against Altemose. That narrow holding is consistent with *Connell* under the facts of this case. No further review is required prior to trial.

CONCLUSION.

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN W. PELINO
DAVID A. GRADWOHL
Pelino & Lentz, P.C.
2300 Packard Building
Philadelphia, PA 19102
(215) 665-1540

Counsel for Respondent, Altemose Construction Co.

SUPPLEMENTAL APPENDIX TO BRIEF IN OPPOSITION OF RESPONDENT, ALTEMOSE CONSTRUCTION COMPANY.

STATUTES AND RULE INVOLVED

Declaratory Judgment Act

The Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, provides in relevant part as follows:

§ 2201. *Creation of remedy*

(a) In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. . . .

§ 2202. *Further relief*

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

Clayton Act

Section 4 of the Clayton Antitrust Act, 15 U.S.C. § 15, provides in relevant part as follows:

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly

made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only —

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

Section 16 of the Clayton Antitrust Act, 15 U.S.C. § 26, provides in relevant part as follows:

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and

upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue. . . .) (In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

National Labor Relations Board
Casehandling Manual (Part One)
Unfair Labor Practice Proceedings (April 1975)

Paragraph 10380.3 of the Casehandling Manual, provides as follows:

Responsibility for Prosecution of Case: The attorney's position vis-a-vis the charging party is a delicate one. During the hearing, the charging party or counsel may make suggestions or give advice; or he may wish to embark along lines of his own. The trial attorney must determine which suggestions to adopt, which embarkations he should resist. He must be tactful but firm, keeping in mind that his is the primary responsibility for the prosecution of the case. Although the charging party is entitled to examine witnesses and to introduce or adduce additional evidence on his behalf, the trial attorney should oppose, either informally or, when necessary, by proper objection on the record, anything which in his sound discretion either will jeopardize the prosecution of the complaint or is unnecessarily cumulative.

No. 85-82

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BUILDING AND CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY, *et al.*,
Petitioners,

v.

ALTEMOSE CONSTRUCTION COMPANY AND CHAMBER OF COMMERCE OF THE UNITED STATES,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM OF RESPONDENT, CHAMBER OF COMMERCE OF THE UNITED STATES, IN PARTIAL SUPPORT AND PARTIAL OPPOSITION

GERARD C. SMETANA
(Counsel of Record)
JOSEPH J. HAHN
ARVEY, HODES, COSTELLO & BURMAN
180 N. La Salle St.
Chicago, IL 60601
(312) 855-5038
For the Council On Labor Law Equality On Behalf of The United States Chamber of Commerce

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Pandick Midwest, Inc., Chicago • 733-6000

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS FOR THE THIRD CIRCUIT

In addition to the parties listed on pages ii and iii of the Petition, the Associated Builders and Contractors, Inc., a co-plaintiff in the district court, withdrew its appeal prior to the decision of the Court of Appeals for the Third Circuit.

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No. 85-82

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

BUILDING AND CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY, et al.,
Petitioners,

v.

ALTEMOSE CONSTRUCTION COMPANY AND CHAMBER OF COMMERCE OF THE UNITED STATES,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

MEMORANDUM OF RESPONDENT CHAMBER OF COMMERCE OF THE UNITED STATES IN PARTIAL SUPPORT AND PARTIAL OPPOSITION

Respondent, Chamber of Commerce of the United States ("the Chamber") requests that this Court deny the petition as to questions 2 and 3, and suggests that the Court may wish to grant the writ to review question presented number 1.

JURISDICTION

Except that the decision of the Court of Appeals was rendered on January 8, 1985, petitioners' jurisdictional statement is not disputed.

STATUTES AND RULES INVOLVED

In addition to the references made on page 2 of the Petition, this case also invokes a request for declaratory relief pursuant to 28 U.S.C §§ 2201-02 (1982), treble damages pursuant to 15 U.S.C. § 15 (1982), and injunctive relief pursuant to 15 U.S.C. § 26.

STATEMENT OF THE CASE

The parties in this case include the Chamber[1] which filed this complaint on behalf of its affected construction user and contractor members in the Philadelphia area, Altemose Construction Company, an open shop construction company working in the Philadelphia area, and the Building and Construction Trades

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1. The Chamber is a federation consisting of over 2700 state and local trade associations and chambers of commerce and has a direct membership of more than 250,000 business activities. It is the largest association of business and professional organizations in the United States.

The Council on Labor Law Equality is a national association of large and small employers, formed to monitor and support labor questions that affect a broad section of industry in order to maintain a balanced approach to the interpretation of national labor policy.

Council (BCTC), an association of 56 labor organizations and trade unions. The Associated Builders and Constructors, Inc. (ABC) initially joined the complaint in this matter, but is no longer involved in the case. The matter arises from the response of the Chamber and Altemose to the efforts of the BCTC to exclude non-Union contractors from the construction industry in the Philadelphia area during the 1970's.

In 1971, the BCTC requested that Altemose sign a "standard sub-contractors" agreement, in order to insure that it would only contract with union subcontractors and hire only union labor to work in its company. (Ap. 6a-7a) The arrangement desired by the BCTC would have demanded that Altemose fire 150 employees, and replace them with all union members. When Altemose expressed its unwillingness to sign a union-only

subcontractors' agreement, members of the BCTC began a campaign of violence and intimidation in an attempt to convince Altemose to sign. The BCTC has insisted throughout this case that it was not trying to organize Altemose's employees or to settle a legitimate labor dispute between itself and Altemose.[2] (R. 506, 531-2, 633-4, 652-58, 659-661, 665.)*

Other non-union contractors in the Philadelphia area were subjected to the same treatment. Procida Construction

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2. The District Court found that subsequent picketing three years later at a different Altemose job site was for organizational or recognitional purposes. On appeal, the petitioners vigorously contested both the factual and legal relatedness of the subsequent picketing to the question of the initial organizational or recognitional intent of the pickets. This question has been remanded for trial. There is no question of organizational or recognitional picketing in the union conduct relating to chamber members other than Altemose. (A. 26a)

* Reference to the record are cited as (R.)

Company, a Chamber member and open-shop general contractor operating in the Philadelphia area, was similarly intimidated by the BCTC to sign its standard union-only subcontracting agreement. In 1976, Procida contracted to build a Roy Rogers restaurant in Delaware County, Pennsylvania. Procida contacted numerous union and non-union subcontractors to obtain bids for completing electrical, plumbing and excavating work, and found that the non-union contractors offered bids 30% to 40% below those of the union contractors. (R. 1039-50) Upset that Procida subcontracted with non-union contractors, the BCTC began picketing the Procida job site

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3. Nine separate electrical subcontractors were contacted in an effort to obtain the lowest bid. (R. 1037-38)

on May 20, 1976. The BCTC refused to remove its pickets unless Procida signed Form 3, one of the forms containing the restricting subcontracting agreements, and cancelled its contract with the non-union contractors. (R. 1081-90).[4] The violent nature of the picketing caused the construction work to come to a halt. After the BCTC agreed to provide union labor at the same price as that provided by the non-union contractors, Procida capitulated and agreed to sign a written agreement removing the non-union subcontractors and to contract for the services of the union contractors, but did not sign the long term Form 3. (R. 1094-6, 1102-05)

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4. The subcontractor's agreements sought by the defendants, all demanding the exclusive use of union subcontractors, are described in detail in the Altemose brief at p. 9, fn. 10.

During the summer of 1974, Worthington Construction Company, another Chamber member and open-shop contractor, was forced to discontinue work on an addition to a 3-M facility in Bristol, Pennsylvania. BCTC members picketed the worksite at 3-M, also a Chamber member, and vowed to do so until Worthington hired only union subcontractors. (R. 421-22). Because Worthington refused to dismiss its non-union subcontractors and replace them with union members, it eventually lost the 3-M contract, because 3-M employees honored the picket lines manned by the BCTC and Carpenters. (R. 420-21) The BCTC and the Carpenters continued to picket as long as Worthington used the services of non-union subcontractors, regardless of the rates which

Worthington and its non-union subcontractors were paying. (R. 421-21). Ultimately, 3-M hired three union contractors to replace Worthington, and incurred larger fees than those charged by Worthington. (R. 487-89).

While working on a Presbyterian Church project in Pennsylvania and a project for Container Corporation of America, a Chamber member in Oaks, Pennsylvania, Raymond Davis & Sons, Inc., another Chamber member and non-union general contractor, was picketed by BCTC member unions who insisted that it use only union contractors to help complete the projects. Davis was eventually forced to employ only union subcontractors, even though those subcon-

tractors performed substandard work at a higher cost. The picketers beat Davis' non-union employees, and set fire to the construction site in an effort to bring about the change to a union-only project. (R. 367-373)

E. Arol Fesmire, another Chamber member and open-shop contractor in Philadelphia, was similarly forced to replace the non-union contractors with union contractors, and to pay between $4,000 and $7,000 above his original bids to have the same work done by these union contractors. BCTC pickets and 50 union men blocked the ingress and egress at Fesmire's worksite, and refused to allow Fesmire to continue his work until he had released his non-union subcontractors and hired union members to replace them. (R. 358-9)

Each of these situations involved an instance where the BCTC attempted to coerce an open-shop contractor into doing business exclusively with union subcontractors. The BCTC was not involved in a collective bargaining relationship with any of the non-union contractors mentioned, nor was it attempting to organize the non-union employees working for the open shop contractors. The district court found no dispute as to these facts other than the question of the intent of the picketers at the Altemose job site as discussed above. Thus, these findings were not disturbed by the appellate court.

In response to the actions of the BCTC, the Chamber, Altemose, and ABC filed a two count complaint against the BCTC for damages and declaratory and

injunctive relief.[5] Count I alleged that the unions and unnamed co-conspiring union contractors engaged in combinations in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C.§§1, 2). Count II alleged that the unions, acting alone for the benefit of a favored group of union contractors, engaged in combinations in violation of the Sherman Act. The district court granted summary judgment for the defendants in both Count I and Count II, finding a failure of proof of conspiracy in Count I and that the statutory and non-statutory exemptions to the anti-trust laws protect the unions' conduct alleged in Count II, even if a conspiracy could be proved. (A. 66a-73a, 42a - 53a) The Chamber and Altemose appealed to the Third Circuit, which

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5. Only Altemose asked for damages.

reversed the trial court holding that there was sufficient evidence of a conspiracy to withstand the Union's motion for summary judgment as to Count I, and that as to Count II the exemptions did not apply and there were sufficient is ues of material fact to warrant trial.

The application of the statutory exemptions to Count II is an issue of major importance affecting Chamber members throughout the country. It is an issue never directly addressed by this Court and only arguably considered by the Court in Connell Construction Co. v. Plumbers Local 100, 421 U.S. 616 (1975). Because of the unsettled nature of an issue of this magnitude, the Chamber respectfully suggests that the Court may wish to consider whether combinations of unions working together to exclude non-union

contractors from a major construction market, all for the benefit of a favored non-labor group, union contractors, are entitled to the statutory exemptions from anti-trust liability, and thus accommodate its decisions in Connell and Meat Cutters Union v. Jewel Tea Co., 381 U.S. 676 (1965) with the interpretation of H.A. Artists & Assoc. v. Actors' Equity Ass'n, 451 U.S. 704, as presented by the petitioner.

REASONS WHY THE WRIT SHOULD BE DENIED AS TO QUESTIONS PRESENTED 2 AND 3.

The Chamber agrees with Altemose that the petition should be denied as to the Union's questions presented as numbers 2 and 3, and, therefore, adopts the arguvents of the Respondent Altemose as set forth in its Brief in Opposition, Sections I and II, (pp. 5 through 13).

The Chamber, an independent association plaintiff, further states as to question number 3, that its affected members were not parties in any NLRB proceeding against the Philadelphia building trades unions, and therefore any collateral estoppel claim would be invalid as to them.

REASONS WHY THE COURT MAY WISH TO GRANT THE WRIT AS TO QUESTION PRESENTED NO. 1[6]

1. The Application of Hutcheson to Combinations of Unions Acting Alone in Restraint of Trade is Unclear.

The Third Circuit's analysis of the application of statutory exemptions to

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6. The Union's Question No. 1 is more accurately presented as: Does the statutory exemption to the anti-trust laws preclude an anti-trust claim against unions acting amongst themselves for the benefit of a favored group of unionized contractors when they seek subcontractors agreements from general contractors with whom they have no collective bargaining relationships in order to keep non-union contractors out of the market.

the facts in Count II is consistent with this Court's holding in United States v. Hutcheson, 312 U.S. 219 (1941), that unilateral union activity having a labor objective is exempt "[s]o long as the union acts in its self-interest and does not combine with non-labor groups," (App. 11a). Hutcheson stands for the principle that in order to avail themselves of the statutory exemption, the intra-union combination, if in restraint of trade, must be in their self-interest and not in combination with non-labor groups. If either factor exists, that is, if the questioned combination is not in the union's self-interest or the union is in combination with a non-labor group, then the exemptions do not apply. This principle has been applied by the First Circuit in Allied International Inc. v.

International Longshoremen's Ass'n, 640 F.2d 1368, 1380 (1st Cir. 1980), aff'd on oth'r gr'nds, 456 U.S. 212 (1982),[7] the Soviet boycott case, wherein the First Circuit held the statutory exemption to be unavailable because the union's boycott was to further its political goal, conduct that is not within the national labor policy.

Indeed, this analysis is suggested by the plurality decision in Meat Cutters Union, Local 189 v. Jewel Tea, Inc., 381 U.S. 676, 689, 691-93 (1965) wherein this Court, finding the unions to be acting alone, nevertheless found an anti-competitive combination, but exempted them from liability because their goal

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7. The Supreme Court did not decide this issue as it was not raised on appeal.

was within the national labor policy to bargain for and protect work hours. The clear implication in Jewel Tea is that if the unions' goal was simply anti-competitive, that is, "an effort by the unions to protect one group of employers from competition from another," the conduct would not be within the unions' self-interest, and the exemption would not be available. Id. at 693.

2. Jewel Tea Focuses on the "Self Interest" Factor.

The theory underlying Count II arises directly from Jewel Tea. There, local unions representing Chicago area butchers agreed with a food retailers' trade association to limit the hours that store meat departments would be open. Confronted with a potential strike if it refused to accept the conditions, Jewel signed the agreement and sued to invali-

date it under the Sherman Act. The district court found no evidence of a union-employer conspiracy and applied the statutory exemption; but the Seventh Circuit reversed , holding a conspiracy in restraint of trade could be committed by unions acting alone. Jewel Tea Co. v. Associated Food Retailers, 331 F.2d 547 (7th Cir. 1964).

The Supreme Court plurality rejected the union's contention that the exemption was applicable whenever unions acted alone, but recognized a narrow exemption through principles of accommodation:

> [E]xemption for union-employer agreements is very much a matter of accommodating the coverage of the Sherman Act to the policy of the labor laws. Employers and unions are required to bargain about wages, hours and working conditions, and this fact weighs heavily in favor of antitrust exemption for agreements on these subjects. But neither party need bargain about other

> matters and either party commits an unfair labor practice if it conditions its bargaining upon discussions of a nonmandatory subject.

381 U.S. at 689. On this basis the Court concluded that the conduct was exempt from antitrust sanctions:

> [A]lthough the effect on competition is apparent and real ... the concern of union members (with regard to the marketing-hours restriction) is immediate and direct. Weighing the respective interests involved, we think the national labor policy expressed in the National Labor Relations Act places beyond the reach of the Sherman Act union-employer agreements on when, as well as how long, employees must work. An agreement on these subjects between the union and the employers in a bargaining unit is not illegal under the Sherman Act, nor is the union's unilateral demand for the same contract of other employers in the industry.

381 U.S. at 691.

The critical caveat to the Court's conclusion was predicated on the hypothetical situation in which a restraint

on the product market resulted from union conduct that was not justified by the vital interests of union members:

> In such event the limitation imposed by the unions might well be reduced to nothing but an effort by the unions to protect one group of employers from competition by another, which is conduct that is not exempt from the Sherman Act. Whether there would be a violation of §§1 and 2 would then depend on whether the element of a conspiracy in restraint of trade or an attmept to monopolize had been proved.

381 U.S. at 692-93 (footnote omitted).

The concept of union antitrust liability for conduct designed and intended to protect a benefited employer class builds on the principle of Allen Bradley Co. v. IBEW, Local 3, 325 U.S. 797 (1945). There, in a situation involving a non-union co-conspirator, the Court held that "Congress never intended that unions could, consistent with the Sherman Act, aid non-labor groups to

create business monopolies and control the marketing of goods and services." 325 U.S. at 808.

This conforms to the basis of the conclusion in Connell Construction Co. v. Plumbers Local 100, 421 U.S. 616 (1975), that the union could not enhance its legitimate organization goal by compelling a stranger to hire only union subs because such conduct would eliminate competition on a matter unrelated to wages and working conditions. The Connell Court reached this conclusion in a situation in which there was no allegation of, or attempt to prove, the existence of a conspiracy between the union and unionized subcontractors.[8] "It thus appears

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8. Justice Douglas' dissent was based on the absence of a union-employer conspiracy claim in the complaint. 421 U.S. at 638.

that the court has dispensed with the requirement of conspiracy for subjecting union activity to antitrust litigation, at least outside the bargaining relationship." Pacific Maritime Ass'n. v. Federal Maritime Comm'n, 543 F.2d 404, 405 (D.C. Cir. 1976), rev'd on oth'r gr'nds, 435 U.S. 40 (1978) (footnote omitted).

Thus, the test that has emerged from this Court's analysis of the statutory exemption in light of Taft-Harley and Norris-LaGuardia does not focus on whether a union conspired with an employer. Rather, the question turns on whether the union's conduct is in the self-interest of the labor organization in terms of wages, hours and working conditions, and within a collective bargaining relationship. The statutory

exemption does not apply unless the union's conduct bears "a reasonable relationship to a legitimate union interest." Allied Int'l Inc. v. Int'l Longshoremen's Ass'n., 640 F.2d 1368, 1380 (1st Cir. 1980), aff'd, 456 U.S. 212 (1982); See also Adams Ray & Rosenberg v. William Morris Agency, 411 F. Supp. 403, 410-11 (C.D. Cal. 1976).

3. Connell Also Focuses on "Legitimate Self Interest."

In Connell, Local 100 sought restrictive subcontracting agreements similar to the type sought by the unions in this case from persons with whom the union had no bargaining relationship. The Court found the absence of the bargaining relationship to be controlling. Similarly, the facts in this case describe a broad pattern of picketing, violence, enforcement of "fair lists" all

designed to secure the Connell type of restrictive secondary subcontracting clauses. The Third Circuit noted that this case differs somewhat from Connell, because here a subcontracting agreement was not actually signed.[9] (App. 13a)

We respectfully suggest that the focus and analysis in Connell was on the legitimacy of the union's objectives rather than Connell's coerced signature on the agreement. The critical analysis in Connell appears to be:

> The agreements with Connell and other general contractors indiscriminately excluded non-union subcontractors from a portion of the market, even if their competitive advantages were not derived from substandard wages and working conditions but rather from more efficient operating methods. Curtailment of competition based on

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9. Note that in the case of Procida, an affected Chamber member, an agreement was actually signed. Infra at p. 7.

> efficiency is neither a goal of federal labor policy nor a necessary effect of the elimination of competition among workers. Moreover, competition based on efficiency is a positive value that the antitrust laws strive to protect.

This analysis of the non-statutory exemption by Justice Powell recognizes that the lack of legitimate labor objective is synonymous to the requirement that the union act in "its self-interest" as established in Hutcheson. Justice Powell underscores this principle when he establishes that even when the union's goals are arguably legal, "the methods the union [chooses to reach these goals] are not immune from anti-trust sanctions. Connell, 421 U.S. at 625. Therefore, as the statutory exemption in Hutcheson is in the conjunctive, the absence of a legitimate labor objective would preclude the availability of the

exemption. In this case the appellate courts found the unions' effort to be anti-competitive and thus, not within the union's self-interest.

The Third Circuit in applying the statutory exemption to unilateral union conduct relied upon the similarity of the anti-competitive objectives of the union in Connell and in this case, and properly applied the requirement for a legitimate labor objective to the availability of the statutory exemption.

4. H.A. Artist Must be Read in Light of Hutcheson, Jewel Tea and Connell.

The unions, in contrast to this suggested analysis, ask this court to focus its decision on H.A. Artists and Associates v. Actors Equity Ass'n, 451 U.S. 704, from which they argue that the statutory exemption is unavailable only

when they enter into agreements with non-labor groups. They claim that "the single immutable principle in all of this Court's decisions from Hutcheson to H.A. Artists is that 'labor unions acting in their self-interest and not in combination with labor groups enjoy a statutory exemption from Sherman Act liability.'" (Petition citing H.A. Artists 451 U.S. at 714.) The focus of their argument is that if the union's conduct is not in combination with a non-labor group then the statutory exemption applies, regardless of the anti-competitive effects or whether or not their action is in furtherance of a legitimate labor concern. H.A. Artists is a case that focuses only on the issue of whether or not the party in combination with the union was a "non-labor party". The Court in H.A. Artists

concluded that the theatrical agents were indeed labor parties and that therefore, the exemptions applied because the unions were not in combination with non-labor groups. H.A. Artists does not deal with the issue of whether or not the unions were acting on a question of legitimate labor concern.

Moreover, the Court in H.A. Artists, while recognizing the two-prong test in Hutcheson, did not address the "self-interest" prong other than to point out that the matter in discussion was "a labor dispute" and therefore satisfied the self-interest test. 451 U.S. at 715. The remainder of the Court's analysis focused only on the question of whether or not the union's combination was with a non-labor group. Thus, the application

of H.A. Artists to the critical questions raised by this case is unhelpful.

We suggest that while it is true that the unions in this case have not acted with non-labor parties as to the conspiracies alleged in Count II, the objectives of their conduct did not include the resolution of a "labor dispute" and therefore, could not be within the union's self-interest as required by the two-prong test in Hutcheson.

CONCLUSION

The Chamber respectfully suggests that the decision of the Third Circuit, finding the statutory and non-statutory exemptions to be unavailable to this type of union conduct, correctly accommodates the decisions of this Court. Because of the importance of the question to industry generally, the Chamber reluctantly suggests

that the Court may wish to grant the writ limited to Petitioner's Question No. 1, but in the form suggested by the Chamber and Altemose, even though they were the prevailing parties in the appellate court.

Because of the enormous costs and limited resources of contractors in the construction industry, the Court has had and will continue to have, very few opportunities to address these critical issues. The tension between the language of H. R. Artists and Connell concerning the prerequisite of a legitimate labor objective as the sine qua non to the availability of either the statutory or non-statutory exemptions may warrant explication by the court in the compelling setting of the instant case.

It has become evident from the proliferation of cases such as Connell,

Consolidated Express v. N.Y. Shipping Ass'n., 602 F.2d 494 (3rd Cir. 1979), Muko, Inc. v. Southwestern Pennsylvania BCTC, 670 F.2d 421 (3rd Cir. 1982), that the construction trade unions in America have established a pattern of attempting to exclude all non-union competition from their relevant market by exacting non-union subcontracting clauses in agreements with friendly union contractors and through restraint and coercion against stranger contractors, as in this case. Their efforts in achieving these agreements are directed towards creating a monopoly for the union contractors and eradicating competition from non-union contractors in an effort to assure that only union workers are

employed in these markets. At the present time, the lack of clear guidance by the Court for contractors and construction users confronted with these efforts make the resolution of such anti-competitive practices an expensive quagmire into which few can afford to tread.

For these reasons, we reluctantly suggest that Question No. 1 is ripe for review and presents this Court with an opportunity to clarify its position on the application of these exemptions to cases in which the unions, in combination with each other but acting on behalf of favored employers, are attempting to create monopolistic

enclaves that would exclude all non-union competition from the market.

Respectfully submitted,

Gerard C. Smetana
(Counsel of Record)
Joseph J. Hahn
ARVEY, HODES, COSTELLO
& BURMAN
180 North La Salle Street
Chicago, Illinois 60601

For the Council On Labor Law Equality on Behalf of the United States Chamber of Commerce

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No. 85-82

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

BUILDING & CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY, *et al.*,
Petitioners,

v.

ALTEMOSE CONSTRUCTION COMPANY AND CHAMBER OF COMMERCE OF THE UNITED STATES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONERS' REPLY BRIEF

BERNARD N. KATZ
Lewis Tower Building
15th & Locust Streets
Philadelphia, PA 19102

RICHARD B. SIGMOND
260 South Broad Street
Philadelphia, PA 19102

LAURENCE J. COHEN
1125 - 15th Street, N.W.
Washington, D.C. 20005

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

LAURENCE GOLD
815 - 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
(Counsel of Record)

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PETITIONERS' REPLY BRIEF*

ARGUMENT

In this reply we discuss in order the responses to question 1 presented by the petition (which raises a question concerning the labor exemption to the antitrust laws); question 2 (which raises a question concerning the standards to be applied by the courts in ruling on motions for summary judgment in antitrust cases where the showing of a conspiracy is a necessary element of the plaintiff's case); and question 3 (which raises a question con-

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* Throughout this brief "Pet." will refer to the petition for certiorari herein; "App." will refer to the separately bound appendix thereto; "Alt. Br." will refer to the brief in opposition of respondent Altemose Construction Company; and "COC Mem." will refer to the memorandum of respondent Chamber of Commerce of the United States in partial support and partial opposition.

cerning the collateral estoppel effect of decisions of the National Labor Relations Board).

I.

Altemose correctly observes, "The major difference between Count I and II, as recognized by the Third Circuit, is the lack of participation by non-union entities in a conspiracy having secondary effects (App. 11a)" (Alt. Br. 13), and contends that this very distinction "demonstrates that petitioners' [first] question does not require this Court's attention" (*id.*). But there can be no doubt that the Third Circuit's reinstatement of Count II despite the absence therein of any allegation of a union-non-labor group conspiracy squarely raises the question of whether such an allegation (and proof thereof) is critical to Altemose's anti-trust claim. And this aspect of the Third Circuit's decision is plainly inconsistent with this Court's precedents under which the availability of the statutory labor exemption from the anti-trust laws depends on whether the unions are acting unilaterally or in combination with a non-labor group. See Pet. 12-18, to which Altemose does not respond.

The court of appeals did not seek to justify its ruling on Count II on any finding that the defendant unions were not acting in their self-interest, or that the plaintiffs had raised a substantial question of fact as to whether the unions were so acting.[1] Nevertheless, in order to argue that the first question is not presented by the pleadings here Altemose seeks to inject the self-interest issue into the case:

> * * * [T]he elimination of the non-union entries from the conspiracy among unions to engage in secondary

[1] No plausible argument can be made that it is not in the unions' interest to have available work performed by employers with whom the unions have collective bargaining agreements; indeed, this is essential to preserve the job opportunities and labor standards of the unions' members.

> activities does not invoke the protection of the statutory exemption. When unions do not act in their *legitimate* self-interest, they are subject to the restraints of the antitrust laws. See *United Mine Workers v. Pennington*, 381 U.S. 657, 662 (1965); *United States v. Hutcheson*, 312 U.S. 219, 232 (1941). [Alt. Br. 13-14, emphasis added]

Altemose's assertion that the statutory labor exemption requires the unions to prove the legitimacy of their unilateral actions is belied by the very passage from *Hutcheson*, reaffirmed in *Pennington*, which Altemose cites:

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 *are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.* [312 U.S. at 232; 381 U.S. at 662, our emphasis.]

The holding was again reiterated in *H. A. Artists & Associates v. Actor's Equity Assn.*, 451 U.S. 704, 715 set forth at Pet. 13. Thus, while it is true that the exemption is available only if the union is acting in its self-interest, the legitimacy of that self-interest is not open to question in determining whether the union is exempt from the antitrust laws, although, of course, the legitimacy of those actions may be questioned under other laws.

When Altemose finally does reach the merits of the statutory exemption issue the company seeks to equate this case and *Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616 (Alt. Br. 14-15). Altemose observes that the "only divergence of the facts supporting Count II and those in *Connell* is that Altemose (unlike the contractor in *Connell*) refused to sign the subcontractors' agreement. * * *" (*id.* at 15), and asserts "as the Circuit properly concluded, the refusal to sign an unlawful agreement does not deprive Altemose of the protection of the antitrust

law or clothe the unions' activities to make Altemose sign with the shield of the statutory exemption" (*id.*).

We have shown at Pet. 16-18 that the absence of an agreement between Altemose and the defendants is of controlling significance for purposes of the statutory exemption and that insofar as the court of appeals was of the opposite view that court misread *Connell*. Again, Altemose makes no response to the analysis in our petition.

Indeed, even respondent Chamber of Commerce does not contend that *Connell* decided the statutory exemption issue presented by question No. 1 in the petition. The Chamber acknowledges that "the application of the statutory exemptions to Count II * * * is an issue never directly addressed by this Court and only arguably considered by the Court in *Connell Construction Co.* * * * (COC Mem. 13), and represents that that issue is one "of major importance affecting Chamber members throughout the country," (*id.*). Accordingly, the Chamber urges that the Court review the first question presented by the petition (*id.* at 13-14, 30-34). The Chamber's concession with respect to *Connell* and its evaluation of the significance of the statutory exemption issue should, we submit, bear heavily on the Court's consideration of whether the decision below should be reviewed. For present purposes, therefore, our disagreement with the Chamber's novel theory concerning that exemption need not be elaborated. We do note, however, that the Chamber's analysis of the "self-interest" test of *Hutcheson* is wholly without basis in this Court's decisions; the Chamber plainly misinterprets *Meat Cutters v. Jewel Tea*, 381 U.S. 676 and *Connell* because in both cases the issue decided was the legality of an *agreement* between the union and an employer, and therefore turned on the scope of what *Connell*, describes as the "non-statutory exemption." See especially *Jewel Tea*, 381 U.S. at 688 and *Connell*, 421 U.S. at 619.

II.

The second question presented by the petition challenges the legal standard followed by the court of appeals in reinstating Count II despite the district court's decision that plaintiffs had not presented evidence of a conspiracy between the unions and certain contractors sufficient to withstand the defendants' motion for summary judgment. Altemose acknowledges that in so ruling the court of appeals adopted the standard that the court had employed in the *Matsushita* case, wherein this Court has agreed to decide whether that standard imposes too heavy a burden on defendants who oppose summary judgment in antitrust conspiracy cases.[2] Altemose's defense of that standard confirms that the legal issue here is the same as that in *Matsushita*. In both cases the defendants/petitioners have urged that the court of appeals erred in failing to follow the teachings of *Cities Service*,[3] and *Monsanto*,[4] whereupon the plaintiff/respondents have countered by invoking the authority of *Continental Ore Co. v. Union Carbide*, 370 U.S. 690, 698-699 to protest against "compartmentalizing" their evidence of conspiracy. Compare Alt. Br. 6 with Brief for Respondents in Opposition, *Matsushita*, No. 83-2004 at 16-18.

Given Altemose's reliance on *Continental Ore*, we deem it appropriate to state briefly why that decision provides no basis for failing to heed the requirements of *Cities Service*. *Continental Ore* directs the courts to consider *all evidence which supports an inference of conspiracy* without determining whether any individual item of evidence is alone sufficient to enable the plaintiff to meet his burden of proof that a conspiracy exists. *Cities Service*

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[2] *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, No. 83-2004, *cert. granted* April 1, 1985, to review *In re Japanese Electronic Products*, 723 F.2d 238 (C.A. 3).

[3] *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253.

[4] *Monsanto Co. v. Spray-Rite Service Corp.*, —— U.S. ——, 104 S.Ct. 1464 (Mar. 20, 1984).

adds that the courts *may not infer a conspiracy from such evidence* if "the inference that [the defendant's conduct] was the product of factors other than conspiracy is at least equal to the inference that it was due to the conspiracy, thus negating the probative force of the evidence showing such a failure." (*Id.* at 280, see Pet. 18.)[5]

The *Cities Service* rule avoids unnecessary trials in accordance with the purpose of F. R. Civ. P. 56, and also protects unilateral conduct which the antitrust laws permit. As the United States has observed in *Matsushita*: "The *Cities Service* rule safeguards against the possibility that parallel behavior manifesting only the workings of a competitive market might be deemed illegal, an outcome that 'could deter or penalize perfectly legitimate conduct.' *Monsanto Co. v. Spray-Rite Service Corp.*, No. 82-914 (Mar. 20, 1985), slip op. 8."[6]

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[5] Altemose erects a straw man by insisting that no "decision of this Court requires Altemose on a motion for summary judgment *to establish conclusively* that the co-conspirators were not acting independently." (Alt. Br. 9, citing *Cities Service*, 391 U.S. at 298-299). We of course do not seek to impose such a burden on plaintiffs. But Altemose disregards what the *Cities Service* court said in continuing the very sentence to which Altemose refers: "rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." (*Id.*) The discussion in *Cities Service* quoted above in the text establishes what kind of evidence is *not* "sufficient" for that purpose. Accordingly, Altemose errs in contending—and the court of appeals erred in deciding—that "all that is necessary * * * is evidence *tending to show* the absence of independent action." (Alt. Br. 9). And while, as Altemose says, "[W]hether one logical inference from a given set of facts is *more plausible than another* should not * * * be decided on summary judgment but by the ultimate trier of fact" (*id.*), *Cities Service* teaches that the court *must* decide on summary judgment whether the "logical inference" of a conspiracy on the summary judgment record *is at least equally* as plausible as the opposing inference, for, if the evidence is not, the plaintiff is not entitled to present his conspiracy claim to the "trier of fact."

[6] Brief for the United States as Amicus Curiae Supporting Petitioners, No. 83-2004, at 10.

The prudential concerns underlying *Monsanto* have special force in antitrust suits against labor unions, for, if an inference of union-employee conspiracy may be drawn from evidence which is at least equally probative of unilateral conduct, the labor exemption to the antitrust law stated in the Clayton and LaGuardia Acts will be easily eroded (see Pet. 11), and unions will be subject to antitrust sanctions because the unions have, in accordance with the national labor policy, entered into lawful collective bargaining agreements with employers (*id.* 24). The present context thus provides added insights into the deficiencies of the Third Circuit's legal standard, warranting joint consideration of this case with *Matsushita*.

Altemose's charge that we seek a further review of the summary judgment record by this Court (Alt. Br. 7) is without substance. The second question presented is addressed squarely and solely to the soundness of the legal standard employed by the Third Circuit in evaluating that evidence. Moreover, while Altemose asserts "that the evidence demonstrates activities consistent with a concerted action to obtain a result forbidden by the antitrust laws and wholly inconsistent with lawful independent activity" (Alt. Br. 7), the company totally ignores the discussion of the evidence at Pet. 20-22 which shows that each item of "circumstantial evidence" relied on by the court of appeals is at least equally susceptible to the inference that the defendant unions were acting unilaterally.[7] Under the current legal standard—that which

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[7] What Altemose refers to as the "prime example" is "evidence from which it could be found that the Council promised that if Altemose signed a building trades agreement, the Council would send it unionized companies that would finish its jobs at prices lower than that bid by sub-contractors." (App. 9a.) (The court below did not find, as Altemose says, that these would be "non-union contract prices" (Alt. Br. 8), a meaningless concept, since the union does not establish *any* price for construction contracts.) Altemose merely reiterates that this evidence "is highly probative" of a conspiracy. But that is insufficient for Altemose's purpose

is established in *Cities Service*—that evidence is therefore insufficient to defeat the defendant's motion for summary judgment.

III.

The decision of the court below that the charging party in an unfair labor practice case before the National Labor Relations Board may in a civil action relitigate an issue which had been decided by the Board is now in conflict with the decisions of three other circuits. Four days before the petition for certiorari was filed (but too late to come to counsel's attention) the Seventh Circuit joined the Fifth and Sixth in holding that the charging party may *not* do so. *Frye v. United Steel Workers of America*, 767 F.2d 1216 (July 11, 1985). The Seventh Circuit so ruled on the basis of a thorough analysis of the collateral estoppel effect of administrative agency decisions under *United States v. Utah Construction Co.*, 384 U.S. 394. The *Frye* decision reinforces the desirability of resolving the conflict in the circuits on this recurring issue on which the court below stands alone.

In denying that there is a conflict among the circuits on this issue, Altemose asserts that there are factual differences between the present case and those of the Fifth and Sixth Circuits which were discussed at pp. 25-26 of the petition. (Alt. Br. 11-12). Once again, the company's effort to confine the decision below to its facts must fail because the Third Circuit's ruling is not based on any factual peculiarities of this case but on a general legal principle; *viz.*, that court's view that a Board decision cannot have a preclusive effect against a charging party. This is elsewhere acknowledged by Altemose: "The Third Circuit's decision in this case denied the application of collateral estoppel based on due process constraints since

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because the union's strong interest in securing work for its members demonstrates that an inference of unilateral union conduct is at least equally rational. See Pet. 22.

Altemose did not control its destiny in the NLRB proceedings." (Alt. Br. 12). Altemose enjoyed no less (and no more) control of the Board proceedings than did the charging parties which the Fifth, Sixth and Seventh Circuits held were estopped by Board decisions.

Altemose's assertion that "the positions of the General Counsel and Altemose were not the same * * *" (Alt. Br. 12, n.9) is grossly misleading, because on the only issue on which estoppel is sought (the union's objective in picketing in 1975) their positions were identical. Altemose does not state that the company was prejudiced by anything that the General Counsel did or failed to do in litigating *that* issue; nor could Altemose do so, since on that issue the company (and the General Counsel) prevailed before the Board, which found an organizational purpose, as both alleged.

Altemose makes the additional point that the NLRB decision only involved picketing during the first four months of 1975, whereas the complaint herein covers conduct beginning in 1971 and continuing after that period (Alt. Br. 10). This circumstance of course does not affect the public importance of the collateral estoppel issue, which, indeed, Altemose does not dispute. Nor does it deprive that issue of significance in the present litigation if Count II of the complaint is otherwise sustained despite our submission on the statutory exemption question. That the events in those four months are not "unimportant" (*id.*) to Altemose's case is evidenced by the references at Alt. Br. 3 to the testimony at R. 633-665 which is addressed to the picketing which was the subject of the NLRB proceeding. Moreover, the finding concerning the object of the defendants picketing in those months would give rise to an inference that the object was the same before and after, that is, throughout the period covered by the complaint.

The Chamber observes that it cannot be estopped because it was not a party to the NLRB proceeding (COC

Mem. 15). This objection was anticipated at Pet. 25, n.13 where we explain that in the event of a remand the Chamber's complaint may be subject to dismissal on other grounds, so that the question whether Altemose is estopped by the NLRB decision is "fundamental to the further conduct of th[is] case", *United States v. General Motors*, 323 U.S. 373, 377. To this the Chamber and Altemose venture no response.

CONCLUSION

For the reasons stated in the petition for a writ of certiorari and in this reply brief the petition should be granted.

Respectfully submitted,

BERNARD N. KATZ
Lewis Tower Building
15th & Locust Streets
Philadelphia, PA 19102

RICHARD F. SIGMOND
260 South Broad Street
Philadelphia, PA 19102

LAURENCE J. COHEN
1125 - 15th Street, N.W.
Washington, D.C. 20005

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

LAURENCE GOLD
815 - 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
(Counsel of Record)

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No. 85-82

In the Supreme Court of the United States

OCTOBER TERM, 1985

BUILDING & CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY, ET AL., PETITIONERS

v.

ALTEMOSE CONSTRUCTION COMPANY AND CHAMBER OF COMMERCE OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

CHARLES FRIED
Solicitor General

DOUGLAS H. GINSBURG
Assistant Attorney General

W. STEPHEN CANNON
Deputy Assistant Attorney General

ROBERT B. NICHOLSON
ROBERT J. WIGGERS
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROSEMARY M. COLLYER
General Counsel
National Labor Relations Board
Washington, D.C. 20570

QUESTIONS PRESENTED

1. Whether the court of appeals erred in reversing the grant of summary judgment for petitioners with respect to a claim that their unilateral union activities violated the antitrust laws.

2. Whether the court of appeals erred in reversing the grant of summary judgment for petitioners with respect to a claim that they conspired with nonlabor entities to violate the antitrust laws.

3. Whether the court of appeals erred in permitting one of the respondents to relitigate an adverse finding made in a proceeding before the National Labor Relations Board at which it was the charging party.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioners are the Building and Construction Trades Council (the Council), an association of building trade unions in the Philadelphia area, and 56 of its member local unions. Respondents are Altemose Construction Company, a nonunion general contractor, and the Chamber of Commerce of the United States, a business association whose members include purchasers of construction services. Respondents filed a two-count complaint in the United States District Court for the Eastern District of Pennsylvania in 1973, alleging that petitioners conspired to eliminate

nonunion contractors and to create a monopoly for union contractors in the greater Philadelphia construction market, in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2.[1] Count I of the complaint alleged that petitioners conspired with unnamed union contractors and other nonlabor entities; Count II alleged only that petitioners conspired among themselves. The complaint sought declaratory and injunctive relief and treble damages in favor of Altemose. Pet. App. 2a-3a,, 10a-11a; C.A. App. 21-44.

The record shows that labor relations in the Philadelphia construction industry are characterized by multi-employer collective bargaining agreements between union subcontractors and local unions. These collective bargaining agreements give union members the right not to work with nonunion laborers. At the general contractor level, the Council has entered into "Building Trades Agreements" with several hundred employers, binding them to do business only with subcontractors that have entered into collective bargaining agreements with the appropriate unions. The approved employers are specified on a list of "fair" subcontractors maintained and distributed by the Council. Petitioners have secured Building Trades Agreements through picketing, violence, and economic pressure. Since 1966, more than 90% of commercial construction in the relevant area has been performed by union contractors. Pet. App. 3a-5a, 22a-26a.

2. Following lengthy discovery proceedings, the district court granted petitioners' motion for summary judgment. Pet. App. 20a-81a. With respect to Count I, the district court concluded that respondents had not produced probative evidence of an actual conspiracy between petitioners

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[1]Another plaintiff, the Associated Builders and Contractors, Inc., an organization of open shop contractors, did not appeal from the district court's grant of summary judgment in petitioners' favor.

and nonlabor entities, such as unionized contractors and developers, suppliers, and financial institutions. *Id.* at 66a-72a. In the absence of direct evidence of such an agreement, the court searched for circumstantial evidence that might support an inference of a conspiracy. The court noted that the Council's purpose of organizing the construction industry is a lawful one, and it found "no evidence in the record to suggest that the unions in seeking the subcontractor agreements tried to protect a select group of union contractors and deny non-union firms the option of becoming union or paying union scale wages." *Id.* at 69a. The court concluded that "[a] jury may not infer a union-employer conspiracy from a union's pursuit of a uniform wage and/or employment policy which indirectly benefits an employer group since the identi[t]y of interests is merely coincidental and not necessarily the product of a conspiracy." *Id.* at 70a.

With respect to Count II, the district court held that petitioners' activities were immune from scrutiny under the antitrust laws on the basis of both the statutory and nonstatutory labor exemptions. See generally *H.A. Artists & Associates, Inc.* v. *Actors' Equity Ass'n*, 451 U.S. 704, 714-716 & n.19 (1981) (discussing labor exemptions). First, the court concluded that, in the absence of an agreement between the Council and Altemose, petitioners were, by virtue of the statutory labor exemption, subject only to the remedies provided in the labor laws. Pet. App. 42a-53a. Second, the court concluded that petitioners' conduct also met the requirements of the nonstatutory labor exemption because it occurred in the context of permissible union organizing activity. *Id.* at 54a-66a. In this regard, the court determined that a decision of the National Labor Relations Board (NLRB) in a proceeding in which Altemose was the charging party collaterally estopped Altemose from contesting the organizational purpose of petitioners' activities for the period between January 20, 1975 and May 1, 1975.

Id. at 57a-58a. As for the remainder of the relevant seven-year period, the district court concluded that the Building Trades Agreements were lawful prehire agreements that sufficiently established a collective bargaining relationship to give rise to exemption from the antitrust laws. *Id.* at 61a-66a.

3. The court of appeals reversed and remanded for trial. Pet. App. 1a-19a. With respect to Count I, the court of appeals relied on its decision in *In re Japanese Electronic Products*, 723 F.2d 238, 303-305 (1983), cert. granted *sub nom. Matsushita Electric Industrial Co.* v. *Zenith Radio Corp*, No. 83-2004 (argued Nov. 12, 1985), for the applicable standard by which to judge whether respondents' evidence of an antitrust conspiracy was sufficient to withstand summary judgment—"whether a trier of fact could reasonably infer concert of action." Pet. App. 5a. The court of appeals recognized, as had the district court, that the mere fact that the Building Trades Agreements and collective bargaining agreements favored union contractors as well as union members would support only a "highly speculative" inference that the Council had conspired with those contractors to violate the antitrust laws. *Id.* at 9a. Although the circumstantial evidence of concerted activity was "not overwhelming," the court of appeals concluded that evidence that a contractors' association policed its members' use of nonunion subcontractors and that the Council offered to obtain bids from firms on the fair contractors list if Altemose would sign a Building Trades Agreement was "sufficient to support a reasonable inference" of conspiracy. *Id.* at 10a.

With respect to Count II, the court of appeals held that the statutory labor exemption would not shield petitioners from antitrust liability for violations resulting from the Building Trades Agreements because "the Council did not

act unilaterally when it obtained hundreds of [such] agreements from contractors the intent and effect of which was to exclude non-union contractors from the market." Pet. App. 13a. The court also held that the nonstatutory exemption would not support summary judgment because there were disputed issues of fact with respect to whether the Building Trades Agreements were entered into outside the collective bargaining context and whether the Council's own coercive activities had a lawful organizational purpose. *Id.* at 13a-18a. The court of appeals concluded that Altemose was not precluded from relitigating the lawfulness of the Council's actions during the period from January through May 1975 because "Altemose, as the charging party, had no control over the factual or legal issues tried before the [NLRB]." *Id.* at 18.

DISCUSSION

Although we believe that the court of appeals erred to the extent that it ruled that antitrust liability could be premised on concerted conduct involving only unions and their members, in our view prudential considerations counsel against plenary review by the Court at this stage of the proceedings. The case is interlocutory, and the difficult legal questions presented might more appropriately be considered by this Court on review of a final judgment. Moreover, the court of appeals' discussion of the applicability of the statutory labor exemption to the allegations contained in Count II of petitioners' complaint is unclear and the extent of its holding uncertain. Indeed, in significant respects the court of appeals' analysis is sound and would independently support its reinstatement of Count II insofar as the court of appeals, in fact, correctly interpreted the allegations in that count. Thus, the court of appeals' judgment may rest on an alternative ground, one that does not appear to be challenged by petitioners. The court of appeals may, however, have misunderstood the allegations contained in Count II, an error that may subsequently be

rectified and could at this stage introduce confusion into this Court's consideration of the issues. Finally, the court of appeals' reversal of summary judgment with respect to Count I of the complaint rests on its application of an evidentiary standard that is currently under consideration by the Court in *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, No. 83-2004. It would therefore be appropriate for the Court to hold this petition for disposition in light of the decision in that case.

1. Petitioners contend (Pet. 12-18) that the court of appeals erred in holding that the statutory labor exemption from the antitrust laws does not support summary judgment in their favor on Count II of the complaint, which did not allege a conspiracy between petitioners and nonlabor entities. Although the court of appeals' reasoning is far from clear, we agree with petitioners that the court of appeals erroneously concluded that their unilateral union activity is not entitled to the benefit of the statutory labor exemption. Nonetheless, we do not believe that review by this Court is warranted at this stage of the proceedings.

a. The court of appeals began its analysis of Count II by correctly observing that the statutory labor exemption[2] is unavailable to the extent that respondents alleged "concerted action or agreements between [petitioners] and nonlabor parties having effects outside the * * * collective bargaining relationship." Pet. App. 12a; see *H.A. Artists & Associates, Inc.* v. *Actors' Equity Ass'n*, 451 U.S. 704, 714-715 (1981); *Connell Construction Co.* v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 621-622 (1975); *United States* v. *Hutcheson*, 312 U.S. 219, 232

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[2]The sources of the statutory exemption are Sections 6 and 20 of the Clayton Act, 15 U.S.C. 17, 29 U.S.C. 52, and Sections 4, 5, and 13 of the Norris-LaGuardia Act, 29 U.S.C. 104, 105, 113.

(1941). The court of appeals therefore determined that petitioners' Building Trades Agreements, entered into with general contractors, could not enjoy statutory immunity from antitrust scrutiny. Pet. App. 12a-13a. This aspect of the court of appeals' reasoning undoubtedly represents a proper application of the governing precedents, and it does not appear to be challenged by petitioners.

Nor do petitioners appear to dispute that the court of appeals correctly determined that the nonstatutory labor exemption is inapplicable to these agreements, at least to the extent that the agreements were "entered into outside the collective bargaining context." Pet. App. 16a. Indeed, this portion of the court of appeals' opinion represents a straightforward and conceptually sound application of the decision in *Connell*, which similarly involved agreements between construction unions and general contractors obligating those contractors to do business only with unionized subcontractors.[3] The district court may have been correct that the agreements here, unlike those in *Connell*, are consistent with the federal labor laws because they were entered into in the context of legitimate union efforts to organize the general contractors' employees. Compare Pet. App. 54a-66a with 421 U.S. at 619, 626-635. On the other hand, this issue arguably involves a disputed issue of fact that should not have been resolved on summary judgment. See Altemose Br. in Opp. 3; Chamber of Commerce Mem. 5. In any event, such a factbound question does not merit review by this Court, especially at this interlocutory stage of the proceedings.

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[3]We agree with the court of appeals (Pet. App. 12a-13a, 16a-17a) that *Connell* is applicable even though Altemose did not itself enter into a Building Trades Agreement with the Council. That factual difference between this case and *Connell* is not material: there is no reason to make the exemption depend on the identity and circumstances of the plaintiff, factors that are relevant to the plaintiff's standing and injury, not to the defendants' immunity.

Accordingly, to the extent that Count II rests on allegations concerning the anticompetitive effects of petitioners' Building Trades Agreements, the court of appeals appears to have been correct in reversing the grant of summary judgment, wholly apart from its analysis of petitioners' unilateral conduct, the aspect of the opinion with which petitioners primarily take issue. We are unsure, however, of the extent to which Count II is properly read to allege violations resulting from these Agreements. That count does not allege a conspiracy between petitioners and contractors, and appears instead to rest primarily, if not exclusively, on unilateral union activity distinct from the Agreements. See C.A. App. 40-42. Accordingly, it may be that the court of appeals misinterpreted this aspect of the complaint. That is a matter that should be clarified in further proceedings in the case and is not now in a posture warranting consideration by this Court.

b. Although it is difficult to discern from the court of appeals' opinion, it appears that the court erroneously failed to accord petitioners' unilateral union activities the statutory exemption to which they are entitled. In particular, the court of appeals stated that petitioners' "coercive concerted activities *aimed at obtaining* [Building Trades Agreements] remain subject to antitrust scrutiny under the Sherman Act." Pet. App. 16a (emphasis added). Regardless of whether those agreements would themselves be subject to antitrust scrutiny under *Connell*, however, we think it clear that petitioners' own coercive activities (such as picketing), not engaged in pursuant to a conspiracy with nonlabor entities, and directed toward persuading Altemose and other general contractors to enter into the agreements, are entitled to the statutory exemption.

To the extent that petitioners acted unilaterally and in pursuit of their own self-interest, it matters not whether their conduct was lawful or unlawful. This much has been

clear since *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 483-484, 513 (1940), and *United States* v. *Hutcheson, supra*. As the Court stated in *Hutcheson* (312 U.S. at 232 (footnote omitted)):

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 [of the Clayton Act, 29 U.S.C. 52] are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

Subsequent developments have in no sense cast doubt on this rule; to the contrary, it was reaffirmed as recently as 1981 in *H.A. Artists & Associates*, 451 U.S. at 715. See also *Connell*, 421 U.S. at 621-622. Here, there is no doubt that petitioners' unilateral coercive activities were related to their self-interest in organizing the construction industry. The facts that the Building Trades Agreements may themselves have been unlawful or that petitioners may not have been attempting to organize Altemose's own employees are, under *Hutcheson*, simply irrelevant.[4] It is the labor laws, rather than the antitrust laws, that provide the governing legal standards and the appropriate remedies.

While the court of appeals erred in this respect, we do not believe that its decision warrants plenary review in light of the interlocutory nature of the proceedings and the considerations already discussed with respect to other aspects of

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[4]See also Section 13(c) of the Norris-LaGuardia Act, 29 U.S.C. 113(c) (emphasis added) (defining "labor dispute" as "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating * * * or seeking to arrange terms or conditions of employment, *regardless of whether or not the disputants stand in the proximate relation of employer and employee*").

the court of appeals' decision concerning Count II. We note as well that the court of appeals' discussion is far from pellucid, in part because it never directly addressed the applicability of the statutory exemption to petitioners' unilateral conduct in the section of its opinion purporting to deal with that exemption. See Pet. App. 11a-13a. Rather, the court's error may be discerned only through its unexplained failure to apply the statutory exemption to coercive activity that it subsequently expressly determined was unprotected by the nonstatutory exemption. See *id.* at 16a-17a. In these circumstances, we believe that review by this Court should await further consideration of the issues below in the context of the further factual development that will take place on remand.

2. Petitioners argue next (Pet. 18-24) that the court of appeals erroneously reversed the grant of summary judgment with respect to Count I of the complaint merely because a conspiracy between unions and unionized contractors "could be inferred" (Pet. App. 10a) from circumstantial evidence adduced by respondents. Although the court of appeals did not discuss the appropriate standard in detail, it did state that it was relying on its decision in *In re Japanese Electronic Products*, 723 F.2d 238 (1983), which is currently under submission before this Court *sub nom. Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.* No. 83-2004 (argued Nov. 12, 1985).

In our brief as amicus curiae supporting petitioners in *Matsushita*,[5] we urged that the court of appeals failed to apply the test enunciated by this Court in *First National Bank* v. *Cities Service Co.*, 391 U.S. 253 (1968), which requires that an antitrust plaintiff who seeks to prove the existence of an anticompetitive conspiracy on the basis of

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[5]We are serving copies of that brief on counsel in this case.

circumstantial evidence in the form of parallel conduct can defeat summary judgment only by showing that the evidence is more consistent with the inference that the conduct resulted from the alleged conspiracy than with the inference that it resulted from independent action. Although the matter is not free of doubt, the court of appeals may have committed the same error here, as suggested by its failure to cite *Cities Service* or to refer to the standard established in that case and its conclusions that respondents' evidence was "not overwhelming" and that the evidence would merely "support a reasonable inference" of concerted action. Pet. App. 10a.[6] Accordingly, we believe that it would be appropriate to hold the petition pending the Court's decision in *Matsushita* and then to dispose of the petition as appropriate in light of that decision.

3. Finally, petitioners urge (Pet. 24-27) that the Court should grant the petition to resolve a conflict among the circuits with respect to whether the charging party in a proceeding before the National Labor Relations Board may be collaterally estopped in subsequent judicial proceedings on the basis of an adverse finding by the Board. Compare Pet. App. 18a (not applying collateral estoppel) with *Frye* v. *United Steelworkers*, 767 F.2d 1216 (7th Cir. 1985) (applying collateral estoppel); *International Ass'n of Machinists* v. *Nix*, 512 F.2d 125, 131-132 (5th Cir. 1975) (same); *International Wire* v. *Local 38, IBEW*, 475 F.2d 1078 (6th Cir. 1973) (same), aff'g per curiam 357 F. Supp. 1018, 1025

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[6]On the other hand, the court of appeals' emphasis on whether the union contractors' conduct was prima facie consistent with their economic self-interest (Pet. App. 10a) does reflect the proper inquiry, for conduct at odds with the employers' individual economic interest is more consistent with concerted anticompetitive activity than with independent competitive action. See *Weit* v. *Continental Illinois National Bank & Trust Co.*, 641 F.2d 457, 462-466 (7th Cir. 1981), cert. denied, 455 U.S. 988 (1982); *Bogosian* v. *Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977), cert. denied, 434 U.S. 1086 (1978).

(N.D. Ohio 1972), cert. denied, 414 U.S. 867 (1973).[7] The court of appeals' judgment, however, does not actually depend on this ruling. The NLRB's finding covered only five months of an alleged seven-year conspiracy and could bind only one of the two remaining plaintiffs in this litigation. Moreover, the court of appeals' reinstatement of Count II appears to rest on its discussion of the Building Trades Agreements, wholly apart from the coercive activities to which its collateral estoppel discussion is relevant. See pages 6-8, *supra*. Accordingly, review by this Court is not warranted. See *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956).

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[7]We note that in the cited decisions permitting collateral estoppel of a charging party, the courts do not appear to have discussed the objection raised by the court of appeals in this case, *i.e.*, that a charging party should not be collaterally estopped because he is not in control of the litigation before the Board and therefore does not have a full and fair opportunity to litigate an issue in that proceeding.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, No. 83-2004, and then disposed of as appropriate in light of that decision.

Respectfully submitted.

CHARLES FRIED
Solicitor General

DOUGLAS H. GINSBURG
Assistant Attorney General

W. STEPHEN CANNON
Deputy Assistant Attorney General

ROBERT B. NICHOLSON
ROBERT J. WIGGERS
Attorneys

ROSEMARY M. COLLYER
General Counsel
National Labor Relations Board

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